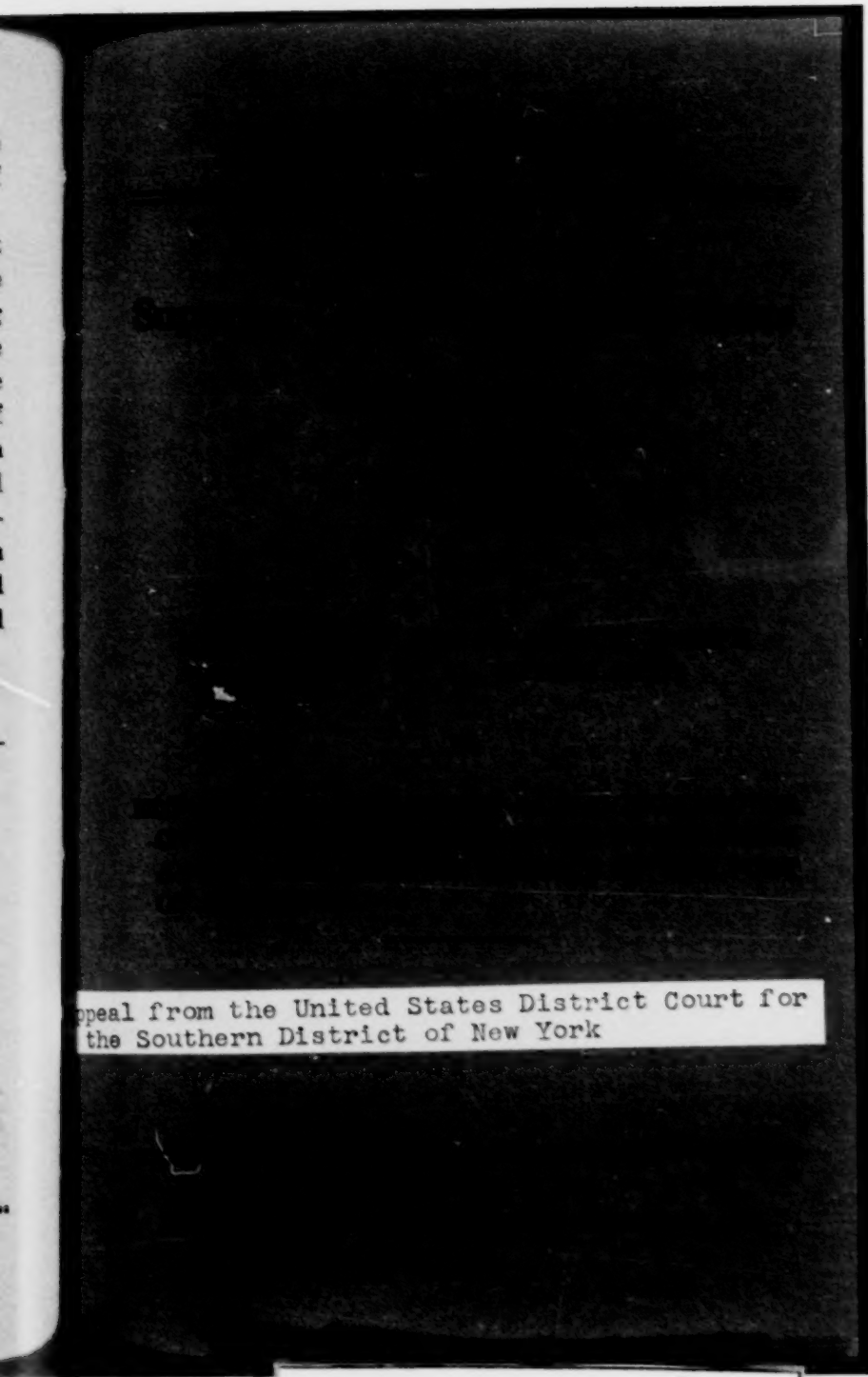


COPY BOUND TO CLOSE IN CENTER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 549

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, ET AL., APPELLANTS,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK

Appeal from the United States District Court for the Southern District of New York

INDEX

	Original	Print
Record from the United States District Court for the Southern District of New York	1	1
Complaint—Nukk v. Shaughnessy	1	1
Exhibit "A"—Order of supervision	12	12
Order show cause	13	15
Affidavit of Michael Nukk	15	17
Complaint—Borich v. Shaughnessy (omitted in printing)	37	
Affidavit of Frank Borich	51	24
Complaint—Simonoff v. Shaughnessy (omitted in printing)	72	
Affidavit of Joseph Simonoff	87	32
Complaint—Kusman v. Shaughnessy (omitted in printing)	109	
Affidavit of Felix Kusman	123	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D.C., APRIL 6, 1955

—1207-0

	Original	Print
Record from the United States District Court for the Southern District of New York—Continued		
Complaint—Lightcap v. Shaughnessy (omitted in printing)	145	
Affidavit of Rose Lightcap	160	47
Complaint—Gottesman v. Shaughnessy (omitted in printing)	183	
Affidavit of Ida Gottesman	197	55
Complaint—Taffler v. Shaughnessy (omitted in printing)	218	
Affidavit of Anna Taffler	231	62
Complaint—Saltzman v. Shaughnessy (omitted in printing)	251	
Affidavit of Benny Saltzman	265	70
Complaint—Geiser v. Shaughnessy (omitted in printing)	286	
Affidavit of Bessie Geiser	300	77
Complaint—Young v. Shaughnessy (omitted in printing)	322	
Affidavit of Martin Young	336	84
Complaint—Sklar v. Shaughnessy (omitted in printing)	357	
Affidavit of Boris Sklar	372	91
Complaint—Gannett v. Shaughnessy (omitted in printing)	395	
Affidavit of Betty Gannett	410	98
Complaint—Bittleman v. Shaughnessy (omitted in printing)	431	
Affidavit of Alexander Bittleman	447	107
Complaint—Jones v. Shaughnessy (omitted in printing)	472	
Affidavit of Blanch Freedman	488	115
Notice of motion to dismiss complaint—Gannett v. Shaughnessy	509	124
Notice of motion to dismiss complaint—Bittleman v. Shaughnessy	510	125
Notice of motion to dismiss complaint—Jones v. Shaughnessy	511	126
Affidavit of Lester Friedman in opposition to motions for temporary injunction and in support of motions to dismiss complaints in Gannett, Bittleman and Jones v. Shaughnessy	512	127
Notice of motion to dismiss complaint—Sklar v. Shaughnessy	521	134
Notice of motion to dismiss complaints—Nukk, Borich, Siminoff, Kusman, Lightcap, Gottesman, Taffler, Saltzman, Geiser and Young v. Shaughnessy	524	136
Affidavit of Blanch Freedman in Nukk (and nine others) v. Shaughnessy in opposition to motion to vacate temporary restraining orders	528	139

DARK PAGE BL

	Original	Print
Record from the United States District Court for the Southern District of New York—Continued		
Notice of motion to dismiss complaint—Gannett v. Shaughnessy	531	142
Notice of motion to dismiss complaint—Bittleman v. v. Shaughnessy	533	143
Notice of motion to dismiss complaint—Jones v. Shaughnessy	535	144
Order convening three-judge court	537	145
Order directing hearing by three-judge court Gannett (and two others) v. Shaughnessy	538	146
Order directing hearing by three-judge court Nukk (and ten others) v. Shaughnessy	540	148
Notice of appointment of three-judge court	542	150
Supplemental affidavit of Lester Friedman	544	152
Notice of settlement and order modifying restraining orders	555	154
Decision and order of three-judge court	560	157
Judgment	572	166
Notice of appeal	575a	169
Order directing submission of original papers	587	179
Order noting probable jurisdiction	592	183

DARK PAGE E

[fol. 1] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL NUKK, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

COMPLAINT—Filed June 2, 1954

Plaintiff, by BLANCH FREEDMAN and GLORIA AGRIN, his attorneys, complaining against the defendant, alleges:

First: The defendant is the District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, which embraces the judicial district of the Southern District of New York, and as such he is the agent and representative, in the said immigration district, of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, and is the highest official in charge of the said Service in the said immigration district.

Second: The defendant is duly authorized in his said official capacity to carry into effect, in the said immigration district, the provisions of the Immigration and Nationality Act of 1952, the rules and regulations promulgated thereunder, and to effectuate the directives and orders of the Attorney General of the United States and of the Commissioner of Immigration and Naturalization.

Third: The Immigration and Nationality Act of 1952 in Section 242(d) thereof [8 U.S.C. § 1252(d)] provides:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions

[fol. 2] which will require any alien subject to s pervision (1) to appear from time to time before ai immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

Fourth: The rule and regulation promulgated in pursuance of the above-stated provision of the Immigration and Nationality Act, Section 242.3(c) of the Immigration and Nationality Regulations [8 C.F.R. § 242.3(c)] provides:

"An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

DARK PAGE BL

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3 Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

Fifth: A final administrative order of deportation was made and entered against the plaintiff on the 8th day of December 1952 and has been outstanding for more than six months.

[fol. 3] Sixth: On or about the 29th day of April, 1954, the defendant, in alleged pursuance of the aforesaid statute and rule, issued an "Order of Supervision" against the plaintiff, [a copy of which is annexed hereto, made a part hereof, and marked "Exhibit A"] imposing upon the plaintiff the following regulations of and restrictions upon his conduct and activity:

"(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) on — o feach week between 8:45 A. M. and 3:45 P. M. to

BLEED THRU

the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

[The written report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)]

(5-a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary branch, affiliate, or subdivision of any such group or organization.

(5-b) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any [fol. 4] of the activities mentioned in sub-paragraph (a) above, provided that the term "associating" as used in this sub-paragraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in sub-paragraph (a).

(5-c) That said alien shall not violate Se. 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of 50 miles from Times Square, New York, N. Y. without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District."

Prior thereto, and in or about April, 1953, the defendant had made his first "Order of Supervision" against the plaintiff, containing substantially similar regulations of and restrictions upon the conduct and activity of the plain-

DARK PAGE BL

tiff, which "Order" was withdrawn on the day and date the extant "Order of Supervision" was made.

[fol. 5] Seventh: Section 242(d) of the Immigration and Nationality Act of 1952, in alleged pursuance of which the aforesaid "Order of Supervision" was made and issued, is, on its face and as applied herein, unconstitutional, invalid, and void, in that:

A)—Said Section denies to plaintiff the equal protection of law, in violation of the Fifth Amendment to the United States Constitution;

B)—Said Section deprives plaintiff of liberty and property without due process of law, in violation of the Fifth Amendment to the United States Constitution;

C)—Said Section unlawfully delegates legislative power to the Attorney General of the United States, his representatives, agents and employees, in violation of Article 1, Section 1 of the Constitution of the United States;

D)—Said Section is vague and indefinite, in violation of the Fifth Amendment to the Constitution of the United States;

E)—Sub-sections (1) and (2) of said Section are vague and indefinite and deprive plaintiff of liberty without due process of law, all in violation of the Fifth Amendment to the United States Constitution;

F)—Sub-section (3) of said Section is so vague and indefinite as to permit the abridgement of plaintiff's right of lawful speech, press, assembly and association, in violation of the First Amendment to the United States Constitution; and to permit compulsion of self-incriminating information in violation of the Fifth Amendment to the Constitution of the United States;

G)—Sub-section (4) of said Section unlawfully delegates legislative power to the Attorney General of the United States, his representatives, agents and employees, in violation of Article 1, Section 1 of the Constitution of the United States.

Eighth: Rule 242.3(c) of the Immigration and Nationality Regulations constitutes a delegation of rule-making

BLEED THRU

power to the defendant which is illegal, unwarranted by and in violation of the provisions of Section 242(d) of the Immigration and Nationality Act of 1952.

Ninth: The "Order of Supervision" made and issued in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 is unconstitutional, invalid and void in that:

A)—Said order is an unlawful exercise of legislative power by the Attorney General of the United States, his representatives, agents and employees, in violation of Article 1, Section 1 of the Constitution of the United States;

[fol. 6] B)—Said order bears no reasonable relation to a lawful exercise of the power to deport or to the eventual deportation of the plaintiff;

C)—Said order is harsh and punitive, and imposes punishment upon the plaintiff without judicial process, in violation of the Fifth Amendment to the Constitution of the United States;

D)—Said order imposes punishment upon the plaintiff in violation of the Eighth Amendment to the Constitution of the United States;

E)—Said order and more particularly the regulation and restriction upon the conduct and activity of the plaintiff numbered (2) thereof, is so vague and indefinite as to permit an abridgement of plaintiff's right to free speech, press, assembly and association, in violation of the First Amendment of the United States Constitution; deprives plaintiff of liberty without due process of law, and permits the compulsion of incriminating information all in violation of the Fifth Amendment to the United States Constitution;

F)—Said order and more particularly the regulation and restriction upon the conduct and activity of the plaintiff numbered (3a) thereof, is unauthorized by the statute and further imposes upon plaintiff compliance therewith within a time that is, as a matter of law, unreasonably short;

G)—Said order and more particularly the regulation and restriction upon the conduct and activity of the plaintiff numbered (3b) thereof, is unauthorized

DARK PAGE BLE

by the statute; deprives plaintiff of liberty without due process of law, and is so vague and indefinite as to permit deprivation of plaintiff's property without due process of law all in violation of the Fifth Amendment to the United States Constitution;

H)—Said order and more particularly the regulation and restriction upon the conduct and activity of the plaintiff numbered (4) thereof, deprives plaintiff of liberty and property without due process of law, in violation of the Fifth Amendment to the United States Constitution;

I)—Said order and more particularly the regulation and restriction upon the conduct and activity of the plaintiff numbered (6) thereof, is unauthorized by statute; deprives plaintiff of liberty and property, and inflicts upon him punishment without due process of law, all in violation of the Fifth and Eighth Amendments to the United States Constitution;

J)—Said order and more particularly the regulation and restriction upon the conduct and activity of the plaintiff numbered (5-a) and (5-b) thereof, abridges plaintiff's freedom of speech, press, assembly and association in violation of the First Amendment to the United States Constitution; and are vague and indefinite in violation of the First and Fifth Amendments to the United States Constitution;

K)—Said order and more particularly the regulation and restriction upon the conduct and activity of the [fol. 7] plaintiff numbered (5-c) thereof, is an unlawful usurpation of legislative power in violation of Article I, Section 1 of the United States Constitution; and subjects plaintiff for the same offense to be twice put in jeopardy in violation of the Fifth Amendment to the United States Constitution.

Tenth: The aforesaid regulations of and restrictions upon the plaintiff's conduct and activities, incorporated in the said "Order of Supervision", are, under the facts and circumstances hereinafter set forth, unlawful in that they are unreasonable and an abuse of power.

Eleventh: The imposition of any of the regulations upon and restrictions of the plaintiff's conduct and activity are

ED THRU

unreasonable in that the history of the plaintiff's conduct, since the commencement of proceedings against him, establishes that they are unnecessary to insure plaintiff's availability for all lawful purposes or to secure the "interests of the United States."

The plaintiff is a man 47 years of age, was born in Russia and is now stateless. He last entered the United States legally for permanent residence in 1939. He has lived in this country continuously ever since. He is married and is the father of two American-born children, both sons, and resides with his family. He is a carpenter by trade.

So much of paragraph (2) of the "Order of Supervision" as relates to physical and mental examination at the unrestricted discretion of the defendant is unreasonable in that it is not limited to such examinations as may be necessary to effect the deportation of the plaintiff, and as to all other examinations is unnecessary, the plaintiff's health having at all times been cared for adequately by his own physicians.

So much of paragraph (2) of the "Order of Supervision" as related to the furnishing of information is unreasonable, in that (a) the defendant is free to invade the plaintiff's right to privacy, to disregard the protections [fol. 8] of and to inquire into facts and circumstances protected by such privileges as those accorded husband-wife, doctor-patient, lawyer-client and Fifth Amendment; and (b) the defendant is free to exercise the power with such frequency as to burden and harass the plaintiff as, in fact, he has done.

Paragraph (3-a), (3-b), (4) and (6) of the "Order of Supervision" are unreasonable in that they burden and restrict unnecessarily, the movements, conduct and activity of the plaintiff.

Paragraph (3-a) unnecessarily limits plaintiff's time to report a change of residence or employment in that (a) he has always been available to the defendant and his whereabouts known to the defendant; (b) he has always complied with and intends, in good faith, to continue to comply with Section 265 of the Immigration and Nationality Act of 1952, to report such changes within the statutorily prescribed time of ten days; (c) there are no reasonable grounds from which to infer that the plaintiff

DARK PAGE BL

will not continue to be available to the defendant and make his whereabouts known.

Paragraph (3-b) unnecessarily restricts the plaintiff's freedom of movement in that (a) he has always been available to the defendant; (b) he intends in good faith to continue to be available to the defendant; and (c) there are no reasonable grounds from which to infer that the plaintiff will not continue to be available to the defendant and make his whereabouts known.

Paragraph (4) unnecessarily restricts the conduct of and places a burden upon the plaintiff, in that (a) he has always been available to the defendant; (b) he intends in good faith to continue to be available to the defendant; (c) there are no reasonable grounds from which to infer that the plaintiff will not continue to be available to the defendant and to make his whereabouts known.

[fol. 9] Paragraph (4) is unreasonable for the further reason that it has resulted in the curtailment and continues to effect a curtailment of the plaintiff's ability to find employment in his trade, which has substantially reduced his earning capacity and income.

Paragraph (5) unnecessarily restricts the plaintiff's freedom of movement in that (a) he has always been available to the defendant; (b) he intends in good faith to continue to be available to the defendant; (c) there are no reasonable grounds from which to infer that the plaintiff will not continue to be available to the defendant and make his whereabouts known; (d) travel beyond 50 miles from Times Square is necessary for the plaintiff, from time to time, in the pursuit of lawful travel and vacation purposes as he may desire to make in the course of normal living.

Paragraphs (5-a) and (5-b) of the "Order of Supervision" are unreasonable in that they (a) prohibit lawful membership in lawful political associations, lawful political activity and lawful personal associations; and (b) they are so vague and indefinite as to make it impossible for the plaintiff to ascertain the conduct and activities on his part prohibited by those paragraphs.

Paragraph (8) of the "Order of Supervision" is unreasonable in that it, in effect, imposes an additional crimi-

EED THRU

nal penalty for criminal conduct whose penalty is fixed by statute.

[fol. 10] Twelfth: This action is brought:

(a) to secure a declaration that (I) Section 242(d) of the Immigration and Nationality Act of 1952 is unconstitutional, invalid, void and inoperative; (II) the "Order of Supervision" aforesaid, is unconstitutional, invalid, illegal, void and inoperative; (III) the aforesaid regulations of and restrictions upon the conduct and activity of the plaintiff, incorporated in the aforesaid "Order of Supervision" are unconstitutional, invalid, illegal, void and inoperative; (IV) the aforesaid regulations of and restrictions upon the conduct and activity of the plaintiff, incorporated in the aforesaid "Order of Supervision" are unreasonable and an abuse of power; and

(b) to direct the defendant to set aside *aside* and cancel the aforesaid "Order of Supervision", or, in the alternative, to strike therefrom the aforesaid regulations of and restrictions upon the conduct and activity of the plaintiff incorporated therein; and

(c) to enjoin and restrain the defendant from requiring the plaintiff (I) to submit to supervision as required by the aforesaid "Order of Supervision", or, in the alternative, (II) to comply with the aforesaid regulations of and restrictions upon his conduct and activity, incorporated in the aforesaid "Order of Supervision."

Thirteenth: This Court has jurisdiction of this action under the provisions of 5 U. S. C. § 1009 and 28 U. S. C. § 1339.

Fourteenth: Unless the relief requested herein is granted, the plaintiff will suffer irreparable injury, in that, compliance with the aforesaid "Order of Supervision" and the regulations of and restrictions upon his conduct and activities subject him to deprivations of his constitutional rights, and non-compliance is a violation of the penal provisions of Section 242(d) of the Immigration and Nationality Act of 1952, which may subject him to criminal prosecution for felony, carrying the penalty of fine in a sum not to exceed $1,000 or imprisonment not to exceed one year, or both.

DARK PAGE BLE

Fifteenth: The plaintiff has no adequate remedy either within the governmental agency or at law.

[fol. 11] Wherefore, the plaintiff asks the judgment of this court that:

1. A declaratory judgment be made and entered declaring that:

(a) Section 242(d) of the Immigration and Nationality Act of 1952 is unconstitutional, invalid, void and inoperative;

(b) The "Order of Supervision" hereinabove referred to, is unconstitutional, invalid, illegal, void and inoperative;

(c) The regulations of and restrictions upon the conduct and activity of the plaintiff, thereinabove referred to, incorporated in the aforesaid "Order of Supervision", are unconstitutional, invalid, illegal, void and inoperative;

(d) The regulations of and restrictions upon the conduct and activity of the plaintiff, hereinabove referred to, incorporated in the aforesaid "Order of Supervision", are unreasonable and an abuse of discretion.

2. An order be made and entered directing the defendant to set aside and cancel the "Order of Supervision", hereinabove referred to or, in the alternative, to strike therefrom the regulations of and restrictions upon the conduct and activity of the plaintiff, hereinabove referred to.

3. An order be made and entered enjoining and restraining the defendant from requiring the plaintiff (1) to submit to supervision as required by the "Order of Supervision", hereinabove referred to, or, in the alternative, (2) to comply with the regulations of and restrictions upon his conduct and activity, hereinabove referred to, incorporated in the aforesaid "Order of Supervision."

4. For such other and further relief as to this Court may deem just and proper in the premises.

Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address 220 Broadway, Borough of Manhattan, New York 38, N. Y.

D THRU

[fol. 12] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

District File No. 2270-418 729-DDPB

A. R. No. A4 849 583

Date April 29, 1954

Order of Supervision

In the case of Michael Nukk, whose deportation in accordance with law was ordered on December 8, 1952.

Section 242(d) of the Immigration and Nationality Act provides:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

DARK PAGE BL

Therefore, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place desigated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (Person) on Thursday of each week, bet. 8:45 A. M. & 3:45 P. M. to the Officer in Charge of the Immigration and Naturaliza-
[fol. 12a] tion Service at Ellis Island, New York Harbor, N. Y.

The written report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)

(5)(a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground

ED THRU

to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of 50 miles from Times Square, New York, N. Y., without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District.

Edw. J. Shaughnessy, District Director, New York, N. Y.

I, Michael Nukk, hereby acknowledge that I have read and understand the terms of this order, a copy of which I have received. I further understand that failure to comply with the terms of this order or with any of the conditions of 242(d) of the Immigration and Nationality Act, will subject me to prosecution.

A. M. Park, Ellis Island, New York Harbor.
(Refuses to sign.) 2109 19th Street, Astoria, L. I. N. Y.

I, —— ——, hereby acknowledge that I understand the terms set forth above and hereby agree to furnish a written report — each month to the Officer in Charge concerning the alien's name, registration number, current address, place of employment, associates, and organizational activities, and that I will immediately report any failure on the part of the alien to comply with the terms of the order or information coming to my attention which might indicate

DARK PAGE BL

that the alien intends to abscond or otherwise violate this order.

Witnesses: Edw. M. ——, D. P. O., H. L. Cole, D. P. O.

[fol. 13] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL NUKK, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

ORDER TO SHOW CAUSE—June 2, 1954

At New York, New York, in said District, on the 2nd day of June, 1954, at 11:15 A. M.

Upon consideration of the annexed affidavit of MICHAEL NUKK, verified the 29th day of May, 1954, and upon the complaint filed herein, a copy of which is hereto attached, the Court enters against the defendant a rule to show cause why, pending the trial and disposition of this action, 1) A declaratory judgment should not be made and entered declaring that (a) Section 242(d) of the Immigration and Nationality Act of 1952 is unconstitutional, invalid, void and inoperative; (b) the "Order of Supervision" dated April 29, 1954 herein referred to is unconstitutional, invalid, illegal, void and inoperative; (c) the regulations of and restrictions upon the conduct and activity of the plaintiff, thereinabove referred to, incorporated in the aforesaid "Order of Supervision", are unconstitutional, invalid, illegal, void and inoperative; (d) the regulations of and restrictions upon the conduct and activity of the plaintiff, herein referred to, incorporated in the aforesaid "Order of Supervision", are unreasonable and an abuse of discretion. 2) An order should not be made and entered directing the defendant to set aside and cancel the "Order of Supervision" herein referred to, or, in the alternative, to strike

EED THRU

therefrom the regulations of and restrictions upon the con-
[fol. 14] duct and activity of the plaintiff, herein referred to.
3) An order should not be made and entered enjoining and restraining the defendant from requiring the plaintiff (a) to submit to supervision as required by the "Order of Supervision" hereinabove referred to, or, in the alternative, (b) to comply with the regulations of and restrictions upon his conduct and activity, herein referred to, incorporated in the aforesaid "Order of Supervision."

Pending the hearing and determination of the motion upon the said rule to show cause, it appearing to the Court that great and irreparable injury may be done to plaintiff if he is compelled, or otherwise obliged, to comply with the terms and conditions of paragraphs 2 and 4 of the aforesaid "Order of Supervision" the defendant is hereby enjoined and restrained from requiring the plaintiff (a) to submit to supervision as required by paragraphs 2 and 4 of the "Order of Supervision" hereinabove referred to, or, in the alternative, (b) to comply with the regulations of and restrictions upon his conduct and activity, herein referred to, incorporated in the aforesaid "Order of Supervision."

This show cause order is made returnable before the Honorable Judges of the United States District Court for the Southern District of New York, on the 8th day of June, 1954 at 10:00 o'clock A. M. in Room 506 of the United States Court House, Foley Square, New York City. Sufficient reason appearing therefor, service of a copy of this order to show cause and the annexed affidavit of Michael Nukk on the defendant, on or before the 3rd day of June, 1954, is sufficient.

Sylvester J. Regan, U. S. D. J.

DARK PAGE B

[fol. 15] AFFIDAVIT OF MICHAEL NUKK

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL NUKK, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

MICHAEL NUKK, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the rules and regulations promulgated thereunder; (b) an "Order of Supervision" made against the plaintiff on April 29, 1954, pursuant thereto; (c) the regulations of and restrictions upon the conduct of the plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 16] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I am a man 47 years of age. I last entered the country in 1939, when I was admitted for permanent residence, and have lived in the United States continuously for ever since. I was born in Estonia and am now stateless. I am married

EED THRU

and live with my wife and two young sons, native-born, aged 15 and 6. I am a carpenter by trade, although, at present, for reasons stated hereinafter, I am employed as a building superintendent.

In May, 1951, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On December 8, 1952, a final administrative order of deportation was made against me.

Thereafter, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1252), the Immigration Service lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U. S. 206 (1953)].

In or about April, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242 (d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252(d)], under authority granted him by Section 242.3(e) of the Immigration and Nationality Regulations [8 C. F. R. § 242.3(e)]. This order imposed upon me a series of restrictions on and regulations of my conduct and activity. On April 29, 1954, this "Order" [fol. 17] was withdrawn, and a substantially similar "Order" issued, containing regulations of and restrictions upon my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed hereto.

The supervision exercised over me herein under the terms and conditions of "Order" is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I

DARK PAGE B

should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a "supervisory" order for over a year, my capacity to earn a living has been seriously affected, my living arrangements disrupted, my normal activity and relationships curtailed, and I have been open to abuse and harassment by the defendant and his agents in the Immigration Service, who, under the "Order", have asserted petty tyranny over me.

[fol. 18] The "Order of Supervision" requires me to report in person to Ellis Island each Thursday.

The necessity to appear and report means that one working day out of each week is lost to me. I am a carpenter by trade, but because I am unable to work a full week I have found it impossible to obtain employment in my trade. In order to support my family, I have had to accept a job as the superintendent of an apartment house. As such I earn $215 per month. As a carpenter I used to be able to earn approximately $120 per week. This differential of income is of the utmost importance to me. Not only is it difficult, with the cost of living as it is, to support my family on my present earnings, but I had always wanted to send my boys through school and to be in a position in which my wife need not work. Both of these things will be made impossible unless this requirement of the order is lifted.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which disrupts my life and may injure my health. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to 48 hours, and requiring me to procure the defendant's per-

EED THRU

mission—to be given or withheld in his complete discretion —to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

The further requirement that I limit my travel to a radius [fol. 19] of fifty miles from Times Square, New York City, is truly in the nature of a "house arrest" for which there is no lawful authority. The fact that the boundaries of my "House" encompass a radius of fifty miles does not negate the fact that I am being confined to prescribed jail limits. The size of the house is not the essence of "house arrest", rather it is confinement to a circumscribed area. This provision affects me in a special way, in that, some of my wife's relatives live beyond the limit of 50 miles. It had been our family practice to visit them from time to time, and, under the current "Order" this will be made impossible.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent the defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to maintain myself and my family or to exercise that freedom of movement that is my right. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as effectively to deprive me of my liberty and property?

The "Order" further gives the defendant the right to compel me to "furnish such information as may be deemed fit and proper" by the defendant or his agents in the Immigration Service. Every occasion on which I report is used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I [fol. 20] am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision". The "Order" requires weekly reporting only of "(a) the name, (b) alien registration num-

DARK PAGE BLE

ber, (c) date, (d) current address, (e) place of employment". Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected to sweeping interrogations as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

The "Order" directs me to:

> ". . . terminate and remain disassociated from, mem- [fol. 21] bership in, if any, support or other activity, if any, in or in futherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.
>
> ". . . refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of the activities mentioned in [the above paragraph]; provided that the term "associates" as used in this paragraph shall not be construed to include

ED THRU

members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies or activities of any of the organizations or activities mentioned in [the above paragraph]."

These directions, so apparently in violation of the Constitution's guarantee of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* has, by statute, been declared not illegal. See 50 U.S.C. §783 (f). Nor has every policy or doctrine of the Communist Party been determined—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiiliates", whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? Does it prohibit attending a meeting where [fol. 22] such doctrine or policy is discussed? Does it prohibit writing such approval in a newspaper, or in a letter?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "Policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Com-

DARK PAGE BI

munist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory —the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the [fol. 23] same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is mean by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissable" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement.

EED THRU

If I assert my right to be free of the imprisoning "supervision" of the "Order", I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the tem-[fol. 24-50] porary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

MICHAEL NUKK

Sworn to before me this 29 day of May, 1954, Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Certa filed with N. Y. Co. Clk. & Reg. Commission Expires March 30, 1956.

[fol. 51] AFFIDAVIT OF FRANK BORICH—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK BORICH, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK, ss:

FRANK BORICH, being duly sworn deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration

DARK PAGE BL

as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the Rules and Regulations promulgated thereunder; (b) an "Order of Supervision" made against plaintiff on February 19, 1953, pursuant thereto; (c) the regulations of and restrictions upon the conduct of plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

I submit this affidavit in support of the motion for [fol. 52] temporary relief set forth in the foregoing order to show cause.

I have been a legal resident of the United States since 1913, when I entered this country for permanent residence. I married a native-born American citizen, with whom I live, and we have two native-born daughters who live with us while they attend college. I am a mat-ress-maker by trade.

In July, 1949, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States.

On August 19, 1952, a final administrative order of deportation was made against me. Thereafter, by the operation of Section 242 of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252], the Immigration Service lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F.2d 964, 968, rev'd on other grounds 345 U.S. 206 (1953)].

On February 19, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252(d)], under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations [8 C.F.R. § 243.3(c)]. This order imposed upon me a series of restrictions and regulations of my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed thereto.

EED THRU

The supervision exercised over me herein under the terms and conditions of the "Order" is a mere circumvention of the Constitution and the law denying to the Attorney Gen- [fol. 53] eral and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal prosecution under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a supervisory order for over a year, my capacity to earn a living has been seriously affected, my family plans disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person at Ellis Island each Friday.

To report each week takes almost one full day out of the normal work week. As a result, I have had the utmost difficulty in securing employment during the more than a year that I have been under "supervision". During 1953, I was able to procure only 12 weeks of work in my trade, the mattress industry. This year I have had to turn to [fol. 54] an industry in which I have no skills—the fur industry—in the hope of being able to get work. Since February of this year, I have had to take over 10 different jobs because of the dissatisfaction caused by my absenting myself from work once a week. It should be perfectly obvious that, as a result, I am unable to support my family. My wife, a native-born American, is forced to work in her trade as machinist, although she suffers from a condition

DARK PAGE BL

that makes it dangerous to her life. She is subject, without warning, to amnesia spells that last from 20 minutes to an hour, during which time she becomes completely unaware of her surroundings. While working at her machine or traveling to and from work in the subways, she is liable to suffer serious physical injury. Yet she must keep working to help feed the family and because we are struggling to our utmost capacity to avoid the necessity of having our brilliant twin daughters, now in their junior year of college, leave school to work to help support us and themselves. We believe it would be a dreadful social waste if these girls, honor students, were compelled to forego the balance of their education. If this reporting provision of the "Order" is continued in effect and I am prevented from earning a living, it may result in the destruction of my wife and the disruption of my childrens' lives.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which deprives me of my livelihood, threatens my family's security and future and dis-[fol. 55] rupts my life. For that matter, the additional requirement of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to forty-eight hours, and requiring me to procure defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me. If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent this defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to support myself and my family, a burden to the entire community. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in

ED THRU

the manner he has done and impose such demands upon me as to deprive me of property and my right to earn a living?

Occasions on which I report are used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision". The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am [fol. 56] subjected each week to sweeping interrogatories as to my associations and activities. One time, the agent in charge of me threatened that he would make me report every day if I did not respond to such queries. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements on my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

DARK PAGE BLE

The "Order" further directs me to"

"(6) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.

[fol. 57] "(7) That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliates with or is engaged in any promotion of any of the activities mentioned in paragraph 6."

These directions, so apparently in violation of the Constitution's guarantee of free speech and association, are unreasonable in that they prohibit associations and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* is by statute declared to be not illegal. See 50 U.S.C. §783(f). Nor has every policy or doctrine of the Communist Party been declared—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. The same tenets apply to "affiliates" of the Communist Party, whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the "Order" affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines and policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends or neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing

D THRU

permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

[fol. 58] What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine or policy adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory—the diametric contrary to all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? What is meant by "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant by "reasonable ground to believe" that a [fols. 59-86] a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives" (a) to "play it

DARK PAGE BLE

safe'' and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is ''permissible'' under the ''Order'' is correct, at the risk of criminal prosecution for violating the terms of the ''Order''.

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the ''Order of Supervision'', I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning ''supervision'' of the ''Order'', I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and livelihood, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

Wherefore, I pray that the relief requested in the annexed ''Order to Show Cause'' be granted.

Frank Borich.

Sworn to before me this 1st day of June, 1954. Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Cert. filed with N. Y. Co. Clk. & Reg. Commission expires March 30, 1952. (Seal.)

ED THRU

[fol. 87] AFFIDAVIT OF JOSEPH SIMINOFF—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPH SIMINOFF, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

JOSEPH SIMINOFF, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the Rules and Regulations promulgated thereunder; (b) an "Order of Supervision" made against plaintiff on September 4, 1953, pursuant thereto; (c) the regulations of and restrictions upon the conduct of plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show [fol. 88] cause.

I have been a legal resident of the United States since 1906, when I entered this country at the age of seven. I married a native-born American citizen, with whom I live, and we have three sons, all of whom are veterans of the Second World War, now married and living with their own

DARK PAGE BL

families. I have been and am now, a house-painter by trade.

In October, 1951, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. During all the proceedings I had been free on bail as more specifically set forth in paragraph "Eleventh" of the Complaint herein.

On February 27, 1953, a final administrative order of deportation was made against me. Six months from that date, the Immigration Service, by the operation of Section 242 of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252], lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U. S. 206 (1953).]

On September 4, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252(d)], under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations [8 C. F. R., § 242.3(c)]. This order imposed upon me a series of restrictions and regulations of my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed thereto.

The supervision exercised over me herein under the terms and conditions of the "Order" is a mere circumvention of [fol. 89] the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

EED THRU

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restriction upon my conduct and activities, contained in the "Order". Having lived under a supervisory order for the better part of one year, my capacity to earn a living has been seriously affected, my family plans disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person at Ellis Island each Friday.

This compels me to lose one day each week from my business as an entrepreneur-house painter. It involves not only the loss of one day's income. It means also that there are many jobs I must turn down, because my prospective cus- [fol. 90] tomers refuse to be left in the middle of a paint job for three days: Friday, the day I report, Saturday and Sunday. In fact, it has been so difficult for me to procure work in New York City, where I usually worked, that I have had to seek work out of the city, and bear the additional cost of commutation for my partner and myself. I earned only about $2,200.00 in 1953. It is obvious that such earnings are inadequate, with the cost of living as it is, to support my wife and myself. My wife, therefore, is forced to continue to work, although we had some time ago decided, because of her health, that it would be best for her not to continue; I fear that serious consequences may result.

There is no good reason for demanding such reporting on my part. I have always made myself avaliable to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirements of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which deprives me of my livelihood and disrupts my life. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to forty-eight hours, and requiring me to procure the defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and

DARK PAGE BLE

burdens upon me. If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent this defendant from circumscribing my move- [fol. 91] ments so completely that I will be in virtual protective custody, unable to support myself and my wife, a burden to my sons and the entire community. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as to deprive me of property and my right to earn a living?

Every occasion on which I report is used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision." The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected each week to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. For instance, on May 9, 1954, when I reported at Ellis Island at 9:30 A. M., I was told to appear again with my attorney, at 1:00 P. M. It was only her unavailability that avoided the necessity of my making two trips to the Island in one day for interrogation. The defendant's general unlimited right to demand information is so broad that even more serious [fol. 92] infringements of my right to privacy are still possible under the "Order." Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went

EED THRU

on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

The "Order" further directs me to:

> "(6) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.
> "(7) That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph 6."

These directions are, so apparently in violation of the Constitution's guarantees of free speech and association, [fol. 93] are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* is by statute declared to be not illegal. See 50 U. S. C. § 783(f). Nor has every policy or doctrine of the Communist Party been declared—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. The same tenets apply to "affiliates" of the Communist Party, whatever they may be.

It is not, alone, membership in the Communist Party or

DARK PAGE BLE

association with Communists that the prohibitions in the "Order" affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines and policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends or neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is mean by "activity" in furtherance of "doctrines" or "Policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine or policy adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of [fol. 94] the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory—the diametric contrary to all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who

ED THRU

are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? What is meant by "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I paint the house of a Communist? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leave me with equally evil alternatives: (a) to "play it [fol. 95-122] safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissible' under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order", I run the risk of immediate prosecution for a felony carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and livelihood, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed "Order to Show Cause" be granted.

Joseph Siminoff.

Sworn to before me this 29th day of May, 1954.
Blanch Freedman, Notary Public, State of New

DARK PAGE BLEE

York. No. 31-6393650. Qualified in New York County. Certs. filed with N.Y. Co. Clk. & Reg. Commission Expires March 20, 1956.

[fol. 123] AFFIDAVIT OF FELIX KUSMAN—FILED June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FELIX KUSMAN, Plaintiff,

- against -

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss.

FELIX KUSMAN, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the Rules and Regulations promulgated thereunder; (b) and "Order of Supervision" made against plaintiff on February 1, 1954, pursuant thereto; (c) the regulations of and restrictions of and restrictions upon the conduct of plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show [fol. 124] cause.

ED THRU

I have been a legal resident of the United States since 1939, when I was admitted for permanent residence. I was last a citizen of Estonia and I am now stateless. I am married to a native-born American citizen, with whom I live, and for whose support I am responsible. I have been and am now, a carpenter by trade.

In June, 1953, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On July 31, 1953, a final administrative order of deportation was made against me.

Six months from that date, on February 1, 1954, the Immigration Service, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U.S.C.A §1252), lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U.S. 206 (1953).]

On February 1, 1954, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. §1252(d)]., under authority granted him by Section 242.3(e) of the Immigration and Nationality Regulations [8 C.F.R., §242.3(e)]. This order imposed upon me a series of restrictions and regulations of my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed thereto.

The supervision exercised over me herein under the terms and conditions of the "Order" is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison [fol. 125] me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to

DARK PAGE BLEE

face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a supervisory order for several months, I find that my capacity to earn a living has been seriously affected, my family plans disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person at Ellis Island each Monday.

The necessity to appear and report means that one working day out of each week is lost to me. This not only causes me to lose one day's pay each week, but for months, until only about three weeks ago, it kept me from securing employment. Even now that I have a job, my possible income is reduced by over $50 per week, because my absence one day per week prevents my employment as a foreman-car-[fol. 126] penter, a position which I am otherwise qualified to hold. This loss of earning power is now of critical significance to me. Before my arrest for deportation my wife was gainfully employed as a social worker for the Red Cross. As a result of "visits" by Immigration officers to her place of employment, she was discharged from her job. I am now completely responsible for my wife's support, and our family unit is thus seriously affected by the enforced drop in my earning capacity. The effect of the reporting direction of the "Order of Supervision" thus, obviously, deprives me of property to which I have a constitutional right.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which deprives me of my livelihood and disrupts my life. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days

to forty-eight hours, and requiring me to procure the defendant's permission —to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

The further requirement that I limit my travel to a radius of fifty miles from Times Square, New York City, is truly in the nature of a "house arrest" for which there is no lawful authority. The fact that the boundaries of my "house" encompass a radius of fifty miles does not negate the fact that I am being confined to prescribed jail limits. The size of the house is not the essence of "house arrest" rather it [fol. 127] is confinement to a circumscribed area. For me, this limitation further affects my earning a living. On many occasions, I practiced my trade outside of the City of New York and beyond the 50 mile limit. Now, under the "Order" this is no longer possible, and I am constrained to turn down jobs that I may desire and have a right to accept.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent this defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to support myself and my wife, a burden to the entire community. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as to deprive me of property and my right to earn a living?

Occasions on which I report are used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision". The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment."

DARK PAGE BLE

Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected each week to sweeping interroga- [fol. 128] tories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

The "Order" further directs me to:

> ". . . terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;
>
> ". . . refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of the activities mentioned [fol. 129] in [the above paragraph]; provided that the

D THRU

term "Associates" as used in this paragraph shall not to be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies or activities of any of the organizations or activities mentioned in [the above paragraph]."

These directions, so apparently in violation of the Constitution's guarantees of free speech and association, are unreasonable in that they prohibit association and political action that are acknowldged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* as, by statute, been declared not illegal. See 50 U. S. C. § 783(f). Nor has every policy or doctrine of the Communist Party been determined—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates", whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing [fol. 130] permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of

DARK PAGE BL

organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory — the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a [fol. 131] Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake life-long friends who may be Communists? What are the limits to "associating" with my wife, if I should have "reasonable grounds to believe" her a Communist? May I eat dinner with her, but not discuss politics with her? Would it be a violation of the "Order" for her to help me defend against deportation charges which I am let to understand, the Communist Party also opposes?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and

ED THRU

social relationships, taking the chance that my guess as to what is "permissible" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to suffer deprivation of "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order," I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon [fols. 132-159] my life and liberty, therefore, urgently require that the temporary injunctive relief requested to be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

Felix Kusman.

Sworn to before me this 1st day of June, 1954, Blanch Freedman, Notary Public, State of New York, No. 31-6393650. Qualified in New York County. Certs. filed with N. Y. Co. Clk. & Reg. Commission Expires March 30, 1956. (Seal.)

DARK PAGE BE

[fol. 160] AFFIDAVIT OF ROSE LIGHTCAP—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ROSE LIGHTCAP, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

ROSE LIGHTCAP, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the rules and regulations promulgated thereunder; (b) an "Order of Supervision" made against the plaintiff on April 29, 1954 pursuant thereto (c) the regulations of and restrictions upon the conduct of the plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 161] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I am a woman almost 50 years of age. I entered the country legally in 1913, at the age of 9, when I was admitted for permanent residence, and have lived in the United States continuously for over forty years. I was born in Russia and am now stateless. I am married and lived with

EED THRU

my husband and have most usually been gainfully employed to help support our family unit.

In August, 1950, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On November 21, 1951, a final administrative order of deportation was made against me.

Thereafter, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1252), the Immigration Service lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U. S. 206 (1953)].

On April 16, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242 (d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252 (d)], under authority granted him by Section 242.3(e) of the Immigration and Nationality Regulations [8 C. F. R. § 242.3(e)]. This order imposed upon me a series of restrictions on and regulation of my [fol. 162] conduct and activity. On April 29, 1954, this "Order" was withdrawn, and a substantially similar "Order" issued, containing regulations of and restrictions upon my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed hereto.

The supervision exercised over me herein under the terms and conditions of "Order" is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activites and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order," in violation of my legal rights, or to

face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order." Having lived under a "supervisory" order for over a year, my capacity to earn a living has been seriously affected, my living arrangements disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who, under the "Order", have asserted a petty tyranny over me.

[fol. 163] The "Order" directs me to:

> ". . . terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;
>
> ". . . refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of the activities mentioned in [the above paragraph]; provided that the term "Associates" as used in this paragraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies or activities of any of the organizations or activities mentioned in [the above paragraph]".

These directions, so apparently in violation of the Constitution's guarantee of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* has, by statute, been declared not illegal. See 50 U. S. C. § 783(f). Nor has every policy

or doctrine of the Communist Party been determined—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates", whatever they may be.

To abide by these regulations disrupts the normal social relations, not only of myself, but of my husband, and creates serious problems concerning his relationships with his colleagues. My husband, under the pen name of "Harry Raymond" has employment as a reporter for the *Daily Worker*. In the course of our normal life, prior to the issuance of the "Order of Supervision", I, of course, entertained his co-[fol. 164] workers and associates at our home, and entered into social relationships, outside of our home, with his colleagues and their wives. Since it is quite conceivable that the defendant might consider his associates on the *Daily Worker* to be "Communists", within the meaning of the above regulations, I am placed in a most awkward and ridiculous position. To be certain that I have not violated the "Order", our house must be closed to these people and old friends, or I must absent myself from such gatherings. As to engagements outside of the home, either my husband must go alone, or he must forego this social intercourse.

There is no adequate reason to call for an end to my relations with these people. Continual relations with them will not affect my availability to the defendant, nor can our ties in any way affect the "security" of the United States. To break these ties in no way benefits the Government and yet seriously affect my normal existence. Yet, if I engage in these relationships, I run the risk of criminal prosecution for violation of the "Order of Supervision" and face possible fine or jail.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? [fol. 165] Does it prohibit writing such approval in a news-

DARK PAGE BL

paper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory —the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U. S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist [fol. 166] Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists? What are the limits to "associating" with my husband, if I should have "reasonable grounds to believe" him a Communist? May I eat dinner with him, but not discuss politics with him?

ED THRU

Would it be a violation of the "order" for him to help me defend against deportation charges, which I am led to understand, the Communist Party also opposes?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissible" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

The "Order of Supervision" requires me to report in person to Ellis Island each Thursday. This travel to and [fol. 167] from the Island each week is a severe physical hardship. I am not a well woman. I have been under the constant medical attention for the past several years and the strain upon me affects my physical condition adversely.

Furthermore, to report each week takes almost one full day out of the normal work-week. As a result I have had the utmost difficulty in securing employment, necessary for the maintenance of my family unit, during the year that I have been under "supervision". In fact, it was only a little over a month ago that I procured a job as an unskilled office worker. This job is in constant jeopardy because of my continued need to absent myself from work to report, and, as well prevents me from raising my job-status and pay to the position of book-keeper which I am otherwise qualified to hold. The effect of the reporting direction of the "Order of Supervision" thus, obviously, deprives me of property to which I have a constitutional right.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which disrupts my life and may injure my health. For that matter, the additional require-

DARK PAGE BLEED

ments of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to 48 hours, and requiring me to procure the defendant's permission —to be given or withheld in his complete discretion—to [fol. 168] change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

The further requirement that I limit my travel to a radius of fifty miles from Times Square, New York City, is truly in the nature of a "house arrest" for which there is no lawful authority. The fact that the boundaries of my "house" encompass a radius of fifty miles does not negate the fact that I am being confined to prescribed jail limits. The size of the house is not the essence of "house arrest", rather it is confinement to a circumscribed area. This provision of the "Order" as well as the reporting provision discussed above, creates serious hardship for myself, and, more particularly, my husband, as respects vacations. Last year, we were constrained to accept most inadequate vacation facilities because of these restrictions in the "Order". This year the vacation perspective is equally bad. My husband works hard and needs his yearly vacation; he will not go without me, and the "Order" limits my freedom of motion to such an extent as to prevent us from making proper vacation arrangements.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent the defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to maintain myself or to exercise that freedom of movement that is my right. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what [fol. 169] right may he limit my freedom in the manner he has done and impose such demands upon me as effectively to deprive me of my liberty and property?

The "Order" further gives the defendant the right to compel me to "furnish such information as may be deemed fit and proper" by the defendant or his agents in the Immigration Services. Every occasion on which I report

ED THRU

is used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision". The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected each week to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, [fols. 170-196] unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "super-

DARK PAGE BLEE

vision" of the "Order", I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

Rose Lightcap.

Sworn to before me this 29th day of May, 1954. Blanch Freedman, Notary Public, State of New York No. 31-6393650. Qualified in New York County. Certs. filed with N. Y. Co. Clk. & Reg. Commission Expires March 30, 1956. (Seal.)

[fol. 197] AFFIDAVIT OF IDA GOTTESMAN—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IDA GOTTESMAN, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

IDA GOTTESMAN, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Im-

ED THRU

migration and Nationality Act of 1952, and the rules and regulations promulgated thereunder; (b) an "Order of Supervision" made against the plaintiff on July 6, 1953 pursuant thereto; (c) the regulations of and restrictions upon the conduct of the plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions. [fol. 198] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I am a woman 61 years of age. I entered the country legally in 1910, at the age of 17, when I was admitted for permanent residence, and have lived in the United States continuously for over forty years. I was born in Hungary now a part of Russia and am now stateless. I am unmarried and live with my sister. I have always been gainfully employed, to help support our family unit.

In June, 1949, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On September 17, 1952, a final administrative order of deportation was made against me.

Thereafter, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1252), the Immigration Service lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates". [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U. S. 206 (1953)].

On July 6, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252(d)], under authority granted him by Section 242.3(e) of the Immigration and Nationality Regulations [8 C.F.R. § 242.3(e)]. This order imposed upon me a series of restrictions and regulations of my conduct and activity, as more specifically set forth in

DARK PAGE BLEE

[fol. 199] paragraph "Sixth" of the complaint herein and "Exhibit A" annexed hereto.

The supervision exercised over me herein under the terms and conditions of the "Order" is a mere circumvention of the Constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal penalties under the statutes for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a "supervisory" order for over a period of 10 months, my capacity to earn a living has been seriously affected, my living arrangements disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who, under the "Order", have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person to Ellis Island every Friday. This travel to and from the Island each week is a severe physical hardship. I am neither a young nor a well woman. I have been under [fol. 200] the constant medical attention for the past several years and the strain upon me affects my physical condition adversely.

Furthermore, to report each week takes almost one full day out of the normal work-week. I am a piece-worker in the manufacture of men's neckwear. When I leave work each week to report, particularly in rush periods, it is frowned upon by my employer and puts my job in constant jeopardy. I also suffer a loss of income that

D THRU

ranges from $30 to $50 per month. At my age, which necessarily limits my earning capacity, this is a very serious loss. I am unmarried and must not only provide for my present upkeep, but also for a time in the future when I may no longer be able to work. In addition, I am the sole support of my sister who is so ill that she is totally unable to work. The effect of the reporting direction of the "Order of Supervision" thus, obviously, deprives me of property to which I have a constitutional right.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. This requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which deprives me of property, disrupts my life and may injure my health. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to 48 hours, and requiring me to procure the defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent the defendant from circumscribing my movements so com- [fol. 201] pletely that I will be in virtual protective custody, unable to maintain myself or to exercise that freedom of movement that is my right. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as effectively to deprive me of my liberty and property?

The "Order" further gives the defendant the right to compel me to "furnish such information as may be deemed fit and proper" by the defendant or his agents in the Immigration Service. Every occasion on which I report is used

DARK PAGE BLE

by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision". The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirements of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected each week to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" [fol. 202] extends to, and yet he has no right to know, what I ate for breakfast, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the Constitution to exercise by legislative or administrative fiat.

The "Order" directs me to:

> ". . . terminate and remain disassociated from membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or

EED THRU

geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;

"... refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of the activities mentioned in [the above paragraph]."

These directions, so apparently in violation of the Constitution's guarantee of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* has, by statute, been declared not illegal. See 50 U.S.C.A. §783(f). Nor has every policy [fol. 203] or doctrine of the Communist Party been determined—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates", whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the "Order" affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered

DARK PAGE BLE

to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a [fol. 204] "foreign state"? Or—on the "Aesopian language" theory—the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). Will the defendant deem an affiliate to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to [fol. 205-230] what is "permissable" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed

ED THRU

Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order", I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

Ida Gottesman.

Sworn to before me this 1st day of June, 1954. Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Certs. filed with N.Y. Co. Clk. & Reg. Commission Expires March 30, 1956.

[fol. 231] AFFIDAVIT OF ANNA TAFFLER—Filed June 2, 1954

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANNA TAFFLER, PLAINTIFF,

- against -

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, DEFENDANT.

STATE OF NEW YORK,
County of New York, ss:

ANNA TAFFLER, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this

action and know the matters alleged therein to be true except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the rules and regulations promulgated thereunder; (b) an "Order of Supervision" made against the plaintiff on May 26, 1953 pursuant thereto; (c) the regulations of and restrictions upon the conduct of the plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 232] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I am a woman almost 55 years of age. I entered the country legally in 1914 when I was admitted for permanent residence, and have lived in the United States continuously for almost forty years. I was born in Russia and am now stateless. I was married, and bore two sons. I am now divorced and reside with one of my sons and his wife.

In September, 1948, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On November 14, 1952, a final administrative order of deportation was made against me.

Thereafter, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. §1252), the Immigration Service lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, rev'd on other grounds 345 U.S. 206 (1953)].

On May 26, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242 (d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. §1252 (d)], under authority granted him by Section 242.3 (c) of the Immigration and Nationality Regulations [8 C.F.R. §242.3(c)]. This order imposed

upon me a series of restrictions on and regulation of my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed hereto.

[fol. 233] The supervision exercised over me herein under the terms and conditions of "Order" is a mere circumvention of the constitution and the law denying the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a "supervisory" order for over a year, my capacity to earn a living has been seriously affected, my living arrangements disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who, under the "Order", have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person to Ellis Island each Wednesday. This travel to and from the Island each week is a severe physical hardship. I am not a well woman. I have been under *the* constant medical attention for the past several years and [fol. 234] the strain upon me affects my physical condition adversely.

Furthermore, to report each week takes almost one full day out of the normal work-week. As a result I have had the utmost difficulty in securing employment, necessary for my maintenance, during the year that I have been

under "supervision". This fact has now become critical. I am a divorcee and receive only $15 per week as alimony. Prior to February of this year, I lived with my two sons who contributed to my support. In January, one son married, and in February the other. Although I am living temporarily with one of my sons and his wife, it is neither fair nor good for him or for myself that I should continue to do so. I must earn money to enable me to maintain myself in my own separate apartment. I have no special skills and must find work that I can handle considering my age and physical condition. The kind of jobs I could hold would be those of a cashier or saleslady in a neighborhood shop. But, if I must be absent from work one day per week, it will be impossible for me to obtain employment.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which disrupts my life and injures my health. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to 48 hours, and requiring me to procure the defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

[fol. 235] If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent the defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to maintain myself or to exercise that freedom of movement that is my right. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the

manner he has done and impose such demands upon me as effectively to deprive me of my liberty and property?

The "Order" further gives the defendant the right to compel me to "furnish such information as may be deemed fit and proper" by the defendant or his agents in the Immigration Service. Every occasion on which I report is used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision." The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected each week to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interroga-
[fol. 236] tor, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

The "Order" further directs me to:

> ". . . terminate and remain disassociated from, membership, in, if any, support or other activity, if any in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.
>
> ". . . refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph [preceding]."

These directions, so apparently in violation of the Constitution's guarantee of free speech and -ssociation, are unreasonable in that they prohibit association and political [fol. 237] action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* has, by statute, been declared not illegal. See 50 U. S. C. § 783(f). Nor has every policy or doctrine of the Communist Party been determined—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates", whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by the head of the Communist Party of a "foreign state"? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or — on the "Aesopian language" theory — the [fol. 238] diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and

social relationships, taking the chance that my guess as to what is "permissible" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

[fols. 239-264] Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order", I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

Anna Taffler.

Sworn to before me this 1st day of June, 1954. Blanch Freedman, Notary Public, State of New York, No. 31-6393650. Qualified in New York County. Certs. filed with N. Y. Co. Clk. & Reg. Commission Expires March 30, 1956.

[fol. 265] AFFIDAVIT OF BENNY SALTZMAN—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BENNY SALTZMAN, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant.

STATE OF NEW YORK,
County of New York, ss.:

BENNY SALTZMAN, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the Rules and Regulations promulgated thereunder; (b) an "Order of Supervision" made against plaintiff on October 29, 1953, pursuant thereto; (c) the regulations of and restrictions upon the conduct of plaintiff incorporated in the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 266] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I have been a legal resident of the United States since 1913, when I was admitted for permanent residence. I was last a citizen of Russia and I am now stateless. I am married and live with my wife. We bore three native-born American sons, one of who was killed in World War II. I am responsible for my wife's support. I have been and am now, a house painter by trade.

In September, 1948, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On March 4, 1953, a final administrative order of deportation was made against me.

On October 29, 1953, the Immigration Service, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1252), lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates". [*Mezei* v. *Shaughnessy,* 195 F. 2d 964, 968, rev'd on other grounds 345 U. S. 206 (1953)].

On October 29, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252(d)]., under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations [8 C. F. R., § 242.3 (c)]. This order imposed upon me a series of restrictions and regulations of my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed thereto.

The supervision exercised over me herein under the [fol. 267] terms and conditions of the "Order" is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a supervisory order for

several months, I find that my capacity to earn a living has been seriously affected, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person at Ellis Island on the fourth Thursday of each month.

The necessity to appear and report means that one working day out of each month is lost to me. This causes me to lose one day's pay each month and sometimes two, if reporting day is followed by rainy weather, since I am an [fol. 268] outdoor painter. Any loss of income is important to me at my age. My work is hard physical work which I may not be able to engage in much longer. Loss of earning power now means that much more risk that I will not be able to provide for my wife's and my old age, and we may become burdens upon our sons and the community.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which deprives me of part of my livelihood and disrupts my life. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to forty-eight hours, and requiring me to procure the defendant's permission, to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent this defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to support myself and my wife, a burden to the entire community. If the defendant may not, as a matter of law and constitutional

prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose [fol. 269] such demands upon me as to deprive me of property and my right to earn a living?

Occasions on which I report are used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision." The "Order" requires reporting only of "(a) the name, (b) the alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subject to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make [fol. 270] me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

The "Order" further directs me to:

> ". . . terminate and remain disassociated from, membership, in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;
>
> " . . . refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of the activities mentioned in [the above paragraph].

These directions, so apparently in violation of the Constitution's guarantees of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se*, has, by statute, been declared not illegal. See 50 U. S. C § 783(f). Nor has every policy or doctrine of the Communist Party been determined —even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates," whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

[fol. 271] I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doc-

trines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state?" Or—on the "Aesopian language" theory —the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint* [fol. 272] *Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant *my* "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity

and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissable" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order," I run the risk of immediate prose- [fols. 273-299] cution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

Wherefore, I pray that the relief requested in the annexed Order to Show Cause be granted.

Benny Saltzman.

Sworn to before me this 29th day of May, 1954. Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Cert. filed with N. Y. Co. Clk. & Reg. Commission expires March 30, 1956. (Seal.)

DARK PAGE BL

[fol. 300] AFFIDAVIT OF BESSIE GEISER—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BESSIE GEISER, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss.:

BESSIE GEISER, being duly sworn, deposes and says: I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the Rules and Regulations promulgated thereunder; (b) an "Order of Supervision" made against plaintiff on February 1, 1954, pursuant thereto; (c) the regulations of and restrictions upon the conduct of plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision" and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 301] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I have been a legal resident of the United States since 1907, when I was admitted for permanent residence. I was last a citizen of Russia and am now stateless. I am married to an American citizen, with whom I live, and we have a native-born daughter. I have been and am now, a dress operator by trade.

ED THRU

In October, 1951, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On January 5, 1953, a final administrative order of deportation was made against me.

Six months from that date, in July, 1953, the Immigration Service, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1252), lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U. S. 206 (1953).]

In July, 1953, I was served with an "Order of Supervision", made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252(d)], under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations [8 C. F. R., § 242.3(c)]. This order imposed upon me a series of restrictions and regulations of my conduct and activity. On May 10, 1954, this "Order" was withdrawn, and a substantially similar "Order" issued, containing regulations of and restrictions upon my conduct and [fol. 302] actions, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed thereto.

The supervision exercised over me herein under the terms and conditions of the "Order" is mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order", in violation of my legal rights, or to face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result

DARK PAGE BL

from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order". Having lived under a supervisory order for almost one year, I find that my capacity to earn a living has been seriously affected, my family plans disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person at Ellis Island each second Monday of each month.

The necessity to appear and report means that one working day out of each month is lost to me. This not only [fol. 303] causes me to lose pay each month, but puts my job in constant jeopardy because of my continual absences. At my age, 65, and that of my husband, any loss of earning is a serious matter which may mean, as we grow older, that we will become dependent on our child or the community. The effect of the reporting direction of the "Order of Supervision" thus, obviously, deprives me of property to which I have a constitutional right.

There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which deprives me of my livelihood and may disrupt my future life. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to forty-eight hours, and requiring me to procure the defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

The further requirement that I limit my travel to a radius of fifty miles from Times Square, New York City, is truly in the nature of a "house arrest" for which there is no lawful authority. The fact that the boundaries of my "house" encompass a radius of fifty miles does not negate the fact that I am being confined to prescribed jail limits. The size

ED THRU

of the house is not the essence of "house arrest", rather it is confinement to a circumscribed area. For me, this limitation is a serious blow to a way of life to which I have be- [fol 304] come accustomed. As a break from my hard work, it was one of my greatest pleasures to take trips into the country, most often more than 50 miles from the City of New York. Now I must stop this harmless, pleasant pastime for no sensible reason.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent this defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to support myself, a potential burden to the entire community. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as to deprive me of property and my right to earn a living?

Occasions on which I report are used to harass and insult me, by the defendant's agents in the Immigration Service. I am put by them in a category separate and apart from all other aliens required to "report" to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision". The "Order" requires monthly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am [fol. 305] subjected each time to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order". Certainly, the defendant's power under the "Order" extends to, and yet he

DARK PAGE BLE

has no right to know, what I ate for breakfast, whether I had an argument with my husband, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

The "Order" further directs me to:

> ". . . terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;
> ". . . refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged [fol. 306] in any promotion of the activities mentioned in [the above paragraph]; provided that the term "associating" as used in this paragraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies or activities of any of the organizations or activities mentioned in [the above paragraph]."

These directions, so apparently in violation of the Constitution's guarantees of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it

ED THRU

or association with it *per se* has, by statute, been declared not illegal. See 50 U.S.C. §783(f). Nor has every policy or doctrine of the Communist Party been determined — even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates", whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrines or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting [fol. 307] or speaking at it prohibited?

What is meant by "doctrine" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean doctrines adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory —the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of

DARK PAGE BL

the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a [fol. 308] Communist on a street corner? May I invite a Communist to my home for a social Saturday evening? Must I foresake lifelong friends who may be Communists? What are the limits to "associating" with my husband, if I should have "reasonable grounds to believe" him a Communist? May I eat dinner with him, but not discuss politics with him? Would it be a violation of the "Order" for him to help me defend against deportation charges which I am led to understand, the Communist Party also opposes?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissable" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order", I run the risk of immediate prosecution for a felony, carrying the penalty of one year in [fol. 309-335] prison and $1,000 fine. The critical present

effect upon my life and liberty, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

BESSIE GEISER

Sworn to before me this 1st day of June, 1954. Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Certs. filed with N.Y. Co. Clk. & Reg. Commission Expires March 30, 1956.

[fol. 336] AFFIDAVIT OF MARTIN YOUNG—Filed June 2, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN YOUNG, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

MARTIN YOUNG, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the rules and regulations promulgated thereunder; (b) an "Order of Super-

DARK PAGE BLE

vision" made against the plaintiff on April 21, 1953 pursuant thereto; (c) the regulations of and restrictions upon the conduct of the plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 337] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I am a man almost 50 years of age. I entered the country legally in 1922 when I was admitted for permanent residence, and have lived in the United States continuously ever since. I am married to an American citizen wife and have two native-born children with whom I live. I am employed as a milk salesman.

In October, 1951, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On April 22, 1952, a final administrative order of deportation was made against me.

Thereafter, by the operation of Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1252), the Immigration Service lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*. 195 F. 2d 964, rev'd on other grounds 345 U. S. 206 (1953)].

On April 21, 1953, I was served with an "Order of Supervision," made by the defendant herein, in alleged pursuance of Section 242 (d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252 (d)], under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations [8 C.F.R. § 242.3(c)]. This order imposed upon me a series of restrictions on and regulations of my conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein and "Exhibit A" annexed hereto.

[fol. 338] The supervision exercised over me herein under the terms and conditions of "Order" is a mere circum-

EED THRU

vention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order," in violation of my legal rights, or to face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order." Having lived under a "supervisory" order for over a year, my capacity to earn a living has been seriously affected, my living arrangements disrupted, my normal activity and relationships curtailed, and I have been subject to abuse and harassment by the defendant and his agents in the Immigration Service, who, under the "Order," have asserted a petty tyranny over me.

The "Order of Supervision" requires me to report in person to Ellis Island each Tuesday. To report each week takes almost one full day out of the normal work-week. As a result I have had the utmost difficulty in carrying out the tasks of my employment and in maintaining myself in my job. I have a family to support and am as a result living in constant fear for their economic well-being.

[fol. 339] There is no good reason for demanding such reporting on my part. I have always made myself available to the defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirement of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which disrupts my life. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to 48 hours, and re-

DARK PAGE BL

quiring me to procure the defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent the defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to maintain myself and my family or to exercise that freedom of movement that is my right. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as effectively to deprive me of my liberty and property?

The "Order" further gives the defendant the right to compel me to "furnish such information as may be deemed fit and proper" by the defendant or his agents in the Immigration Service. Every occasion on which I report is used by the defendant's agents in the Immigration Service to harass and insult me. I am put by them in a category separate and apart from all other aliens required to "report" [fol. 340] to the Service. At the whim of the agent in charge I am directed to sit and wait for literally nothing at all, sometimes for hours at a time, until I am permitted to leave, although at the very outset I have made the report required by the "Order of Supervision." The "Order" requires weekly reporting only of "(a) the name, (b) alien registration number, (c) date, (d) correct address, (e) place of employment." Yet, under the purported requirement of the "Order" that I "furnish such information as may be deemed fit and proper" I am subjected each week to sweeping interrogatories as to my associations and activities. From time to time, at the whim of the interrogator, I am directed to return with my attorney for further questioning. The defendant's general unlimited right to demand information is so broad that even more serious infringements of my right to privacy are still possible under the "Order." Certainly, the defendant's power under the

FED THRU

"Order" extends to, and yet he has no right to know, what I ate for breakfast, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

[fol. 341] The "Order" further directs me to:

> ". . . terminate and remain disassociated from, membership, in, if any, support or other activity, if any in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.
>
> ". . . refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph [preceding]."

These directions, so apparenty in violation of the Constitution's guarantee of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* has, by statute, been declared not illegal. See 50 U.S.C. § 783(f). Nor has every policy or doctrine of the Communist Party been determined —even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These

DARK PAGE BL

tenets would obviously apply, as well, to "affiliates", whatever they may be.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the "Order" affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? [fol. 342] Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by the head of the Communist Party of a "foreign state"? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or—on the "Aesopian language" theory—the diametric contray of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same. Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

BLEED THRU

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or [fol. 343] does it mean that I may not pass the time of day with a Communist on *on* a street corner? May I invite a Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives: (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissible" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my property, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order," I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the temporary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

[fols. 344-371] WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

Martin Young.

Sworn to before me this 1st day of June, 1954. Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Certs. filed with N.Y. Co. Clk. & Reg. Commission Expires March 30, 1956.

DARK PAGE BL

[fol. 372] AFFIDAVIT OF BORIS SKLAR—Filed May 25, 1954

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BORIS SKLAR, Plaintiff

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant.

STATE OF NEW YORK,
County of New York, ss.:

BORIS SKLAR, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure: (1) a declaration as to the validity of (a) Section 242(d) of the Immigration and Nationality Act of 1952, and the rules and regulations promulgated thereunder; (b) an "Order of Supervision" made against the plaintiff on May 17, 1954 pursuant thereto; (c) the regulations of and restrictions upon the conduct of the plaintiff incorporated in the said "Order of Supervision"; (2) an order directing the defendant to set aside and cancel the said "Order of Supervision"; and (3) an order enjoining and restraining the defendant from requiring the plaintiff to submit to the said "Order of Supervision" and its terms and conditions.

[fol. 373] I submit this affidavit in support of the motion for temporary relief set forth in the foregoing order to show cause.

I am a man 68 years of age. I entered the country legally in 1913, when I was admitted for permanent residence, and have lived in the United States continuously for over forty years. I was born in Russia and am now stateless. I was married and lived with my wife until her death several

BLEED THRU

years ago. I am a journalist and before my arrest for deportation, I had been employed by the Russian-language newspaper *Russky Golos;* I hope to be employed by this paper again, on a part-time basis.

In September, 1953, I was arrested for deportation on the charge that, after entry, I had been a member of the Communist Party of the United States. On November 17, 1953, a final administrative order of deportation was made against me.

Six months from that date, on May 17, 1954, the Immigration Service, by the operation of Section 242 of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252], lost its power to detain me—or, in the alternative, to keep me under bond—as a matter of "legislative policy in line with constitutional mandates." [*Mezei* v. *Shaughnessy*, 195 F. 2d 964, 968, rev'd on other grounds 345 U.S. 206 (1953)].

On May 17, 1954, I was served with an "Order of Supervision," made by the defendant herein, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252(d)], under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations [8 C.F.R. § 242.3(c)]. This order imposed upon me a series of restrictions on and regulations of my conduct and activity, as more specifically set forth in para-
[fol. 374] graph "Sixth" of the complaint herein and "Exhibit A" annexed hereto.

The supervision exercised over me herein under the terms and conditions of "Order" is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to detain or imprison me. The physical restrictions on my movements, the fetters upon my thinking, my activities and my way of making my living are removed from actual imprisonment by degree only, and not in kind or substance.

I have been advised and I fully believe that the statute and regulations under which the defendant acted and the restrictions and regulations contained in the "Order of Supervision" are unconstitutional, invalid and illegal. I should, therefore, not be required to subject myself to the terms of the "Order," in violation of my legal rights, or to

DARK PAGE BL

face the risk of criminal penalties under the statute for the legitimate exercise of my rights.

I, however, face the immediate problems which result from the unreasonableness of the regulations of and restrictions upon my conduct and activities, contained in the "Order." If I must live under this "Order," my capacity to earn a living may be seriously affected, my living arrangements disrupted, my normal activity and relationships curtailed, and I may be open to abuse and harassment by the defendant and his agents in the Immigration Service, who, under the "Order," have arrogated to themselves the power of petty tyrants.

The "Order" directs me to:

> ". . . terminate and remain disassociated from, membership in, if any, support or other activity, if any, in [fol. 375] or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;
>
> ". . . refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of the activities mentioned in [the above paragraph]; provided that the term "Associates" as used in this paragraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies or activities of any of the organizations or activities mentioned in [the above paragraph.]"

These directions, so apparently in violation of the Constitution's guarantee of free speech and association, are unreasonable in that they prohibit association and political action that are acknowledged to be legal. The Communist Party has never been declared illegal, and membership in it or association with it *per se* has, by statute, been declared not illegal. See 50 U.S.C. § 783(f). Nor has every policy or

BLEED THRU

doctrine of the Communist Party been determined—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. These tenets would obviously apply, as well, to "affiliates," whatever they may be.

For me to abide by the above regulations would constrain me to give up my residence. Since the death of my wife, I have been boarding at the home of Albert Lannon and his family, Mr. Lannon having been indicted and convicted of violating the Smith Act as one of the twelve defendants in *United States* v. *Flynn*, (U.S.D.C., S.D.N.Y.). The Lannon family in the past few years have sheltered and cared for me as though I were a father. They have tended to my physical needs and have afforded me the personal warmth, affection and sociability that a human being requires to [fol. 376] live happily. In addition, I have been able to make financial arrangements with them commensurate with my ability to pay. If I must leave this home, it will create severe hardship for me. I am an old man and I am ailing. I feel that I can no longer live alone and care for myself. I require the care that the Lannon family offers me. I am no longer financially able to support myself independently. I am living on my old age pension of approximately $85 per month, and hope by part-time work to be able to supplement this amount. Even then, it will not be possible for me to pay rent, eat meals in restaurants—as opposed to family meals at the Lannons—and take care of clothing and other needs. There is no adequate reason, on the other hand, to call for an end to my relations with the Lannons. Continual relations with them will not affect my availability to the defendant, nor can our purely family-like ties in any way affect the "security" of the United States. To break these ties will in no way benefit the Government and yet will seriously affect me. Yet, if I continue to reside with the Lannons, I run the risk of criminal prosecution for violation of the "Order of Supervision" and face possible fine or jail.

It is not alone membership in the Communist Party or association with Communists that the prohibitions in the order affect. The language of the "Order" is so vague and indefinite as to make it impossible for me to ascertain generally what it is I must or may not do.

DARK PAGE BLE

I do not know what the defendant deems "support" of doctrines or policies of the Communist Party. Does it mean public speech making? Or does it prohibit as well, approval expressed over the dinner table to friends and neighbors? [fol. 377] Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines or policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the Constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"? Or—on the "Aesopian language" theory—the diametric contrary of all that these say?

What is to be deemed an "affiliate" of the Communist Party from which I must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Parties of the various states, or political subdivisions of the states, or of the various foreign countries. See: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951). Will the defendant deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the deter- [fol. 378] minant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom am I required to refrain from "associating"? Does it mean "associating" in the Communist Party? Or does it mean that I may not pass the time of day with a Communist on a street corner? May I invite a

BLEED THRU

Communist to my home for a social Saturday evening? Must I forsake lifelong friends who may be Communists?

What is meant by "reasonable ground to believe" that a person is a Communist? Must I become the insurer of the political probity of each person with whom I associate?

The vagueness of these prohibitions in the "Order" leaves me with equally evil alternatives: (a) to "play it safe" and relinquish all political expression and activity and many social relationships, or (b) to engage in—what I consider to be—normal and legal political activity and social relationships, taking the chance that my guess as to what is "permissible" under the "Order" is correct, at the risk of criminal prosecution for violating the terms of the "Order".

The "Order of Supervision" requires me to report in person to Ellis Island each Monday morning. This travel to and from the Island each week is a severe physical hardship on a person of my age and delicate physical condition. I have been under constant medical attention for the past several years and have every reason to believe that the strain upon me will affect my physical condition adversely.

There is no good reason for demanding such reporting on my part. I have always made myself available to the [fol. 379] defendant for any proper purpose. My whereabouts have always been known to him. It is my intention to continue to honor my commitments. The requirements of reporting accomplishes nothing more for the defendant, but, for me, imposes an onerous burden which disrupts my life and may injure my health. For that matter, the additional requirements of the "Order of Supervision" cutting my statutory time to report a change of address from ten days to 48 hours, and requiring me to procure the defendant's permission—to be given or withheld in his complete discretion—to change my residence to another immigration district, are equally unnecessary restrictions and burdens upon me.

The further requirements that I limit my travel to a radius of fifty miles from Times Square, New York City, is truly in the nature of a "house arrest" for which there is no lawful authority. The fact that the boundaries of my "house" encompass a radius of fifty miles does not negate the fact that I am being confined to prescribed jail limits.

DARK PAGE BL

The size of the house is not the essence of "house arrest", rather it is confinement to a circumscribed area.

If I am available for all purposes for which the defendant may request my presence, these regulations constitute nothing less than a form of imprisonment. There is nothing, in their broad permissiveness, that can prevent the defendant from circumscribing my movements so completely that I will be in virtual protective custody, unable to maintain myself or to exercise that freedom of movement that is my right. If the defendant may not, as a matter of law and constitutional prerogative, keep me in detention, if he may not demand that I give bail for my freedom, by what right may he limit my freedom in the manner he has done and impose such demands upon me as effectively to de- [fol. 380] prive me of my liberty and property?

The "Order" further gives the defendant the right to compel me to "furnish such information as may be deemed fit and proper" by the defendant or his agents in the Immigration Service. As with others of whom I have heard, I have every reason to believe that I will be subjected to sweeping interrogatories concerning every phase of my life, my activities, my associations and other infringements of my right to privacy. Certainly, the defendant's power under the "Order" extends to, and yet he has no right to know, what I ate for breakfast, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. The "Order" gives the defendant the same unlimited right to subject me to physical and mental examination, unconnected with the effectuation of my deportation and without regard to the fact that I have always cared adequately for my own health. All of these regulations have a potential as an instrument of harassment and, in a greater or lesser degree, make me the defendant's prisoner with power in him, directly and indirectly to exercise control over my life. This is the control he is forbidden by the constitution to exercise by legislative or administrative fiat.

Unless the temporary relief requested in the annexed Order to Show Cause is granted, I will suffer irreparable injury. If I continue to abide by the terms of the "Order of Supervision", I continue to suffer deprivation of my prop-

BLEED THRU

erty, my political rights and my freedom of movement. If I assert my right to be free of the imprisoning "supervision" of the "Order," I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine. The critical present effect upon my life and liberty, therefore, urgently require that the tem- [fols. 381-409] porary injunctive relief requested be granted.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed Order to Show Cause be granted.

Boris Sklar.

Sworn to before me this 24th day of May, 1954. Blanch Freedman, Notary Public, State of New York, No. 31-6393650. Qualified in New York County. Certs. filed with N. Y. Co. Clk. & Reg. Commission Expires March 20, 1956.

[fol. 410] AFFIDAVIT OF BETTY GANNETT—Filed August 6, 1953

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BETTY GANNETT, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

BETTY GANNETT, being duly sworn, deposes and says:

I am the plaintiff in the above-captioned action and submit this affidavit in support of the motion for temporary relief as set forth in the foregoing Order to Show Cause.

DARK PAGE BL

I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure a declaration as to the validity of (1) Section 242(d) of the Immigration and Nationality Act of 1952; (2) an order of supervision made against plaintiff on July 20, 1953 pursuant to said Section (3) the regulations and restrictions upon the conduct of plaintiff incorporated in the said order of supervision; and to direct the defendant to set aside and cancel the said order; and to enjoin and restrain defendant from requiring plaintiff to submit to the said order and its terms and conditions.

I have been a legal resident of the United States since 1914, when I was a child of eight. I am married to an American citizen.

[fol. 411] I have been the subject of deportation proceedings since March 28, 1949, at which time I was served with a warrant of deportation. A final administrative order of deportation was entered against me on October 31, 1952 on the grounds that after entry I was a member of the Communist Party of the United States.

I have been enlarged on administrative bail ever since the commencement of the said deportation proceeding against me, except for such times and such conditions as are more specifically set forth in paragraph "Eleventh" of the complaint in this action.

In June of 1951, I was arrested and indicted for conspiracy to violate the Smith Act (18 U. S. C. 2385). I was tried before a court and jury in the U. S. District Court for the Southern District of New York, and in February, 1953 I was convicted and sentenced to imprisonment for two years. I have appealed from this conviction to the Court of Appeals for the 2nd Circuit, and I am presently preparing and processing my appeal. I have been, since the commencement of the said criminal proceeding, and am presently enlarged on bail in the sum of $20,000.

I was born in Russia, I am at the present time stateless,

BLEED THRU

and as I have said, I am under a prison sentence, so that, during the six months following the entry of the final administrative order for my deportation, I could not make any effort to depart from the United States, nor did the Immigration Service make any effort to deport me.

Under Section 242 of the Immigration and Nationality Act of 1952, the Immigration Service, by operation of law, has lost its power to detain me, as a matter of "legislative policy in line with constitution mandates." (*Mezei* v. *Shaughnessy*, 195 F. 2nd, 964, 968 rev'd on other grounds, 73 S-Ct. 625).

On July 20, 1953, I was served with an "Order of Supervision", made, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952, by the defendant, under authority granted him by Section 242.3(c) of the Immigration and Nationality Regulations (8 C. F. R.). This order imposes upon me a series of regulations of and restrictions upon my conduct and activity, as more specifically set forth in paragraph "Sixth" of the [fol. 412] complaint herein, and Exhibit A annexed thereto.

The supervision exercised over me herein under the terms and conditions of the order is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to imprison me. The physical restrictions upon my movements, the fetters upon my thinking and thoughts, my activities, and my way of making a living are removed from actual imprisonment in degree only, and not in kind or substance.

Since the defendant cannot keep me in physical custody at a place of detention subjected to his regulations of my conduct, how can it now be demanded of me that I be subjected, in his unlimited discretion, to mental and physical examinations. I have never been ill wherein I have been unable to take care of myself without becoming a burden or a danger to the community. Whenever ill, I have engaged my own physicians, paid for them and been treated as they and I saw fit to cure or alleviate my condition. And as for psychiatric examination, I submit is it now to become the Immigration Service' policy to lay the ground work for "brain washing" of political dissidents!

Since I cannot be imprisoned, on what lawful theory

DARK PAGE BL

may my movements be limited to "a radius of fifty miles from Times Square"?—or require me to report at Ellis Island every Tuesday of my life?—or secure defendant's permission to move my home from New York State, across the river to New Jersey, or elsewhere? During all times that I have been at liberty under bond I have been amenable to process. I always have appeared before all governmental authorities as requested and I always have honored every condition of my bail bond. No reason exists to believe that I will not continue to do so, and I represent to this court that I will at all times be available for deportation, or any lawful process or request of the government and, more specifically, of the defendant. Under the circumstances of my lawful employment and my lawful normal routine of living, these conditions are harsh, unreasonable and abusive. The requirement of travelling to Ellis Island every Tuesday of my life is not mere inconvenience, it is a physical hardship, a drain upon my energies, and a serious interference with my job and routine of work.

[fol. 413] The "Order of Supervision" imposes upon me a virtual "house arrest", for which there is no lawful authorization. The fact that the boundaries of my "house" encompass "a radius of 50 miles from Times Square" does not negate the fact that I am being confined to prescribed jail limits. The size of a house is not the essence of a "house arrest", rather it is the confinement to a circumscribed area.

The fact of the matter is, as the defendant well knows, that I do not, in practice, have the freedom of movement of a 50 mile radius.

The 50 mile radius prescribed in the order should permit me to go Southeast to Brooklyn and Long Island, West to New Jersey and Northeast to Connecticut. However, when read in conjunction with the jail limits imposed upon me by the District Court for the Southern District of New York, the "Order of Supervision", in effect, permits me only to go 50 miles in one direction—due North. Hence, not only is the right to go to Brooklyn, New Jersey and Connecticut illusory, but the jail limits of the court bail are cut down by about 100 miles since the Southern District

BLEED THRU

extends as far North as Hudson and includes all of Sullivan County—all of which is beyond the 50 mile radius limit of the "Order of Supervision" herein.

These regulations of my conduct require that I give "information deemed fit and proper" in the unlimited discretion of the defendant, his representatives or agents. Such a regulation leaves the defendant free to demand of me information which in the present period of hysteria, if given, government authorities may use to incriminate me. Other information may be such as relates to communications to my husband, my doctor or my lawyer, all of which no one has the legal right to extract from me. The defendant's general unlimited right to demand information is unreasonable in that it could constitute a serious breech of my right to privacy, and might put me in the degrading position of being an informer against other people. Certainly, his power under this order extends to, and yet he has no right, to know, what I ate for breakfast, whether I had an argument with my husband, what friends I had dinner with, where I went on Saturday night, what I think of the municipal elections, the war in Korea, the 15 cents subway fare, or the prospects of an economic depression. Is the Service saying that the heart and mind of an alien is to be an open book for any government official—high or petty—to read?

The order further directs me to:

[fol. 414]"(6) That said alien shall terminate, and remain disassociated from, membership, in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, and section, subsidiary, branch, affiliate or sub-division of any such group or organization.

"(7) That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in Paragraph 6."

DARK PAGE BLEE

I have been advised that such regulations are unconstitutional and illegal. I submit to this court that I have stated what I believe to be the program and activities of the Communist Party before Hon. Edward J. Dimmock, a judge of this court and the trial judge in the Smith Act prosecution against me. I stated, in part:

> "Will the jailing of Communists, your Honor, wipe out the stark reality of today, that monopoly capitalism in this, the richest country in the world, can keep its wage slaves at work only because production is geared for destruction and war, for mass violence?
>
> Will the jailing of Communists make less inhuman the expenditure of seven and one-half billion dollars for atom bombs—for horrible weapons of mass annihilation—while funds are unavailable to wipe out the degrading slums which defile our cities, or to build sorely needed schools, hospitals, playgrounds and parks?
>
> Will the jailing of Communists halt the senseless, barbarous war in Korea which brings death and destruction to innocent men and women and children and heartlessly cuts short the young lives of sons reared with so much love and tears by tens of thousands of American parents? How heinous a crime is this war in Korea, is most revoltingly exposed in 'Operation Smack' with its decorated programs for the onlookers of the orgy of killings and maimings.
>
> Will the jailing of Communists, your Honor, abolish the centuries-old oppression of the Negro people, the lynchings and the frame-ups, the segregated ghettoes, the indignities and humiliation daily perpetrated against a proud and courageous people so that Southern plantation owners together with the bloated men of Wall Street can squeeze out extra billions in super-profits from the second-class citizenship status of the Negro people?
>
> Of course not. These evils are the evils of a decadent capitalism which holds human life cheap and the scramble for gold sacred.
>
> It is because the Communist Party is dedicated to the abolition of these evils, that I am a Communist.

.EED THRU

It is because the Communist Party points to the vast scientific and technical knowledge which can, once the [fol. 415] conditions of capitalism are eliminated, produce a life of abundance for all, that I am a Communist.

It is because the Communist Party rejects the misanthropic theory of racism and white superiority, and recognizes neither the superiority nor the inferiority of any people, that I am a Communist.

It is because the Communist Party struggles with all its energies against the twin menace of war and fascism, that I am a Communist.

It is because the Communist Party teaches that human beings were meant to live in peace, in dignity, in equality and freedom, and to apply the treasury of human knowledge to the material and cultural well-being of mankind and not for profit and greed of a few, that I am a Communist.

Whether in those years long ago in New York, or in the struggles of the young miners and steel workers in Ohio, or among the unemployed in Pennsylvania, the steel workers of Ambridge and Youngstown, the agricultural migratory workers of California, the metal miners of Butte, I have tried to help the workers understand that only unity, only organization, only struggle can improve their working and living conditions, and that only the ideas of communism will point the way to permanent security, permanent peace and permanent progress."

To this Judge Dimmock replied:

"You have not been convicted or sentenced for the things which you described when you addressed the Court before sentence. You have been convicted of and sentenced for a conspiracy to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. If all that you had done were the things that you described in addressing the Court, you would not have been convicted and would not have been sentenced."

DARK PAGE BL

Clearly, it is unreasonable to frame a regulation which could prohibit and subject to criminal prosecution the advocacy and teaching of doctrines (which I understand to be those of the Communist Party) and which a Judge of this Court deemed to be lawful and a proper exercise of the right of freedom of thought and expression.

However, assuming arguendo their validity, I submit the language in which they are drawn is so vague and of such indefiniteness in meaning, that I must represent to this Court that I have no way of ascertaining precisely what it is I am being called upon to do and what it is I am being enjoined from doing.

My work, as an employee of the Communist Party is [fol. 416] that of Educational Director. This involves research, writing articles, and lecturing on the program and policies of the Communist Party, the preparation of study materials for its members.

I do not know what "disassociating" from the Communist Party (or other organizations listed) means. What must I do to "disassociate". Am I to give up my job—my only source of livelihood?

The regulations directs that I do not "support" or further "the doctrines and policies of the Communist Party." Is my research, and are my writings to be considered the proscribed "support" or "activity" in "furtherance of the doctrines and policies" of the Communist Party (or other listed organizations)? I do not know what would be deemed, under the order, to be Communist Party doctrine or policy. I know, for example, that opposition to discrimination against the Negro people in housing, jobs, schools, etc., is a basic Communist Party doctrine. I also know that this policy and position is advocated and supported by the National Association for the Advancement of Colored People and hundreds of other organizations and individuals. Under the "Order of Supervision" am I proscribed from supporting and furthering such a policy? Does not the same rationale apply to advocating an armistice truce in Korea?—or urging the repeal of the Smith and McCarran Acts or any of the innumerable views of social, economic and political problems of the day.

EED THRU

Under the said order, not only must I not support or further the doctrines of the Communist Party, but must I desist similarly from activity in relation to an "affiliate" thereof. No standard or guide is afforded me to determine which organization the defendant now, or will in the future, deem an "affiliate" of the Communist Party.

Section 7 of the "Order of Supervision" imposes restrictions that would change my whole life, would seriously affect my liberty and deprive me of my earning power.

If I cannot associate with Communists, it means I cannot properly prepare and prosecute my appeal from the Smith Act conviction now pending in the Court of Appeals. My co-defendants, with whom I must consult and collaborate, are, obviously, known members of the Communist Party. This regulation, therefore, is tantamount to a denial of my right to take my appeal.

[fols. 417-446] To disassociate from "Communists" would, as well mean, that I must resign my job and give up social relationships of long standing.

Unless the temporary relief requested in the annexed order to show cause is granted, I will suffer irreparable injury. If I comply or attempt to comply—at my hazard—with the terms of the "Order of Supervision", I will, in effect, imprison myself, be forced to forego my livelihood and lawful social and business relations and cease the preparation of my appeal which is being jointly prosecuted with my eleven other co-defendants. If I do not, and cannot, comply, I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine.

No other demand for the relief requested herein has been made to any other court or judge thereof.

WHEREFORE, I pray that the relief requested in the annexed "Order to Show Cause" be granted.

Betty Gannett.

Sworn to before me this 4th day of August, 1953. Blanch Freedman, Notary Public, State of New York No. 31-6393650. Filed N. Y. County, N. Y. Com. expires 3/30/54.

DARK PAGE BLE

[fols. 447-448] AFFIDAVIT OF ALEXANDER BITTLEMAN—Filed August 6, 1953

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ALEXANDER BITTLEMAN, Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

ALEXANDER BITTLEMAN, being duly sworn, deposes and says:

I am the plaintiff in the above-entitled action and submit this affidavit in support of the motion for temporary relief set forth in the foregoing Order to Show Cause.

I am fully familiar with the facts and circumstances of this case. I have read and know the contents of the complaint in this action and know the matters alleged therein to be true, except as to those matters alleged upon information and belief, and as to those matters I believe it to be true.

The purport of the action is to secure a declaration as to the validity of (1) Section 242(d) of the Immigration and Nationality Act of 1952; (2) an order of supervision made against plaintiff on July 20, 1953, pursuant to said Section (3) the regulations and restrictions upon the conduct of plaintiff incorporated in the said order of supervision; and to direct the defendant to set aside and cancel the said order; and to enjoin and restrain defendant from requiring plaintiff to submit to the said order and its terms and conditions.

[fol. 449] I have been a legal resident of the United States since February 6, 1912. I am now past sixty-three years of age, married and reside with my wife on Mt. Airy Road, Croton-on-the-Hudson, New York.

I have been the subject of deportation proceedings since

BLEED THRU

January 14, 1948, at which time I was served with a warrant of deportation. A final administrative order of deportation was entered against me on March 26, 1952, on the grounds that after entry I was a member of the Communist Party of the United States.

I have been enlarged on administrative bail ever since the commencement of the said deportation proceeding against me, except for such times and such conditions as are more specifically set forth in paragraph "Eleventh" of the complaint in this action.

In June of 1951, I was arrested and indicted for conspiracy to violate the Smith Act (18 U.S.C. 2385). I was tried before a court and jury in the United States District Court for the Southern District of New York, and in February, 1953, I was convicted and sentenced to imprisonment for three years. I have appealed from this conviction to the Court of Appeals for the Second Circuit, and I am presently preparing and processing my appeal. I have been, since the commencement of the said criminal proceeding, and am presently enlarged on bail in the sum of $20,000.

I was born in the City of Berdichev, Province of Kiev, Russia, on January 9, 1890, but I am at the present time stateless, and as I have said, I am under a prison sentence, so that, during the six months following the entry of the final administrative order for my deportation, I could not make any effort to depart from the United States, nor did the Immigration Service make any effort to deport me.

[fol. 450] Under Section 242 of the Immigration and Nationality Act of 1952, the Immigration Service, by operation of law, has lost its power to detain me, as a matter of "legislative policy in line with constitutional mandates." Mezei v. Shaughnessy, 195 F. 2nd, 964, 968 rev'd on the grounds, 73 S. Ct. 625).

On July 20, 1953, I was served with an "order of supervision", made, in alleged pursuance of Section 242(d) of the Immigration and Nationality Act of 1952, by the defendant, under authority granted him by Section 242.3(c) of the Immigration and Nationality regulations (8 C.F.R.). This order imposes upon me a series of regulations of and restrictions upon my conduct and activity, as more specifi-

DARK PAGE E

cally set forth in paragraph "Sixth" of the complaint herein, and Exhibit A annexed thereto.

The supervision exercised over me herein under the terms and conditions of the order is a mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to imprison me. The physical restrictions upon my movements, the fetters upon my thinking, my activities and my way of making a living are removed from actual imprisonment in degree only, and not in kind or substance.

Since defendant cannot keep me in physical custody at a place of detention, subjecting my conduct to regulations, how can it now be demanded of me that I be subjected, in unlimited discretion, to mental and physical examinations. I have never been ill wherein I have been unable to take care of myself without becoming a burden or a danger to the community. Whenever ill, I have engaged my own physicians, paid for them and been treated as they and I saw fit to cure or alleviate my condition. And as for psychiatric examination, I submit is it now to become the Immigration Service's policy to lay the groundwork for declaring political dissidents insane!

[fol. 451] Since I may not be imprisoned, on what lawful theory may my movements be limited to a "radius of fifty miles from Times Square"?—or require me to report at Ellis Island every Tuesday of my life?—or secure defendant's permission to move my home from Croton to Newark, or elsewhere?" During all times that I have been at liberty under bond I have been amenable to process. I always have appeared before all governmental authorities as requested and I always have honored every condition of my bail bond. No reason exists to believe that I will not continue to do so, and I represent to this court that I will at all times be available for deportation, or any lawful process or request of the government and, more specifically, of the defendant. Under the circumstances of my lawful employment and my lawful normal routine of living, these conditions are harsh, unreasonable and abusive. I am a man past 63 years of age. The requirement of travelling to Ellis Island every Tuesday of my life is not mere incon-

E BLEED THRU

venience, it is a serious physical hardship and drain upon my energies.

I live in a rural community, 35 miles from Times Square where casual travel by car in performing the ordinary necessities of living—as shopping for food, social intercourse, etc. take me beyond the figurative chalk mark 15 miles from my home. The order of supervision imposes upon me a virtual "house arrest",—for which there is no lawful authorization. The fact that the boundaries of my "house" encompass "a radius of 50 miles from Times Square" does not negate the fact that I am being confined to prescribed jail limits. The size of a house is not the essence of a "house arrest", rather, it is the confinement to a circumscribed area.

The fact of the matter is, as the defendant well knows, that I do not, in practice, have the freedom of movement of a 50 mile radius.

[fol. 452] The 50 mile radius prescribed in the order should permit me to go southeast to Brooklyn and Long Island, west to New Jersey and north to Connecticut. However, when read in conjunction with the jail limits imposed upon me by the District Court for the Southern District of New York, the order of supervision, in effect, permits me only to go 50 miles in one direction—due north. Hence, not only is the right to go to Brooklyn, New Jersey and Connecticut illusory, but the jail limits of the Court bail are cut down by about 100 miles, since the Southern District extends as far north at Hudson and includes all of Sullivan County—all of which is beyond the 50 mile radius limit of the "Order of Supervision" herein.

These regulations of my conduct require that I give "information deemed fit and proper" in the unlimited discretion of the defendant, his representatives or agents. Such a regulation leaves the defendant free to demand of me information which I may fear, if given, government authorities may use to incriminate me. Other information may be such as relates to communications to my wife, my doctor or my lawyer, all of which no one has the legal right to extract from me. The defendant's general unlimited right to demand information is unreasonable in that it could constitute a serious breach of my right to privacy. Certainly, his power under this order extends to, and yet he

DARK PAGE BLE

has no right to know, what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went on Saturday night, what I think of the municipal elections, the war in Korea, the 15 cents subway fare, or the prospects of an economic depression. Is the Service now saying that the heart and mind of an alien is to be an open book for any government official—high or petty—to read?

The order further directs me to:

> [fol. 453] ". . . terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.
>
> . . . refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in Paragraph 6."

I have been advised that such regulations are unconstitutional and illegal.

I submit to this Court that I have stated my understanding of the doctrines and policies of the Communist Party before Hon. Edward J. Dimmock, a Judge of this Court and the Trial Judge in the Smith Act prosecution against me. I stated:

> ". . . Marxism-Leninism is proving to be the savior of humanity. I mean the teachings of Marx, of Engels, of Lenin, of Stalin, the teachings of our Party, and not the stool-pigeon version of Marxism-Leninism concocted by the FBI and the Department of Justice.
>
> Marxism-Leninism has already proven—proven in life—to be the surest, the truly scientific guide, not to violent revolution, not to violent overthrow of the American Government, but a guide to every progressive thought and action of our time.

LEED THRU

I am therefore proud and happy to reaffirm my complete and unreserved devotion to the working class teachings, principles and theories of Marxism-Leninism.

And I must add this: To write as I did, that Stalin is the greatest leader of men in our epoch is not a crime against our nation. I say it is a patriotic service. How? Because it helps the American people understand better the world we live in and the new world that is taking shape before our eyes; because it [fol. 454] helps our people overcome the warmongers and fascists in our own midst and to accept the offers of peace, peaceful collaboration and co-existence that consistently and persistently come from Stalin and the Soviet Union; because it helps our working class and all other people to benefit, to learn from the scientific and world-liberating teachings of the greatest living interpreter and creator of Marxism-Leninism.

It is precisely with the help of these Marxist-Leninist teachings that we, the American Communists, have found finally our way to what we call and believe is the American road to socialism. This is the road of struggle for peace and democracy which in our estimation must lead to the curbing of the economic and political power of the monopolists.

It must lead to the rise of a powerful anti-fascist and anti-monopoly peace coalition, led by the working class, and to the election of a government representing and backed by such a coalition. And then we say further: the victory of the American people in this phase of struggle against the monopolies will create the condition for the election of a government committeed to socialism, peacefully, democratically and constitutionally, a government fulfilling the tasks and functions of a proletarian dictatorship. This government will, in our interpretation, build up the new state power that will abolish capitalism and build socialism.

This is our advocacy and teaching. This is what I wrote in the very article which the Government cited in the indictment as my overt act which they never dared to cite in these proceedings.

Writing on the long-range meanings of the fight for

DARK PAGE BL

peace and democracy I said in this overt act: It is the fight for curbing the powers of the monopolists, for preserving, extending and further developing the democratic gains and liberties of the American people, for the establishment of conditions favorable for the peaceful transition to the Socialist Revolution in the United States."

This was written and published in Political Affairs in September, 1948, page 12, second column, beginning with line 4—my overt act—." (pp. 16424-16426.)

To these remarks Judge Dimmock replied:

"THE COURT: (to the defendants) You have not been convicted or sentenced for the things which you described when you addressed the Court before sentence. You have been convicted of and sentenced for a con- [fol. 455] spiracy to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. If all that you had done were the things that you described in addressing the Court, you would not have been convicted and would not have been sentenced."

Clearly, it is unreasonable to frame a regulation which could prohibit and subject to criminal prosecution the advocacy and teaching of doctrines (which I understand to be those of the Communist Party) and which a Judge of this Court deemed to be lawful and a proper exercise of the right of freedom of thought and expression.

However, assuming arguendo their validity, I submit the language in which they are drawn is so vague and of such indefiniteness in meaning, that I must represent to this Court that I have no way of ascertaining precisely what it is I am being called upon to do and what it is I am being enjoined from doing.

I am an economist and political analyst. My work involves collating facts on the economic situation and outlook in the United States and abroad as they affect general and political events of the day. This requires research and analysis of social-economic problems, the reporting in writing of my findings and conclusions—and wherever possible

ED THRU

their publication. I am employed to do this by the Communist Party of the United States.

I do not know what "disassociation" from the Communist Party (or other organizations listed) means. What must I do to "disassociate"? Am I to give up my job—my only source of livelihood?

The regulations direct that I do not "support" or further "the doctrines and policies of the Communist Party." Is [fol. 456] my research, analysis and writings to be considered "activity" in "support" or "furtherance of the doctrines and policies" of the Communist Party (or other listed organizations?) I do not know what would be deemed under the Order, to be Communist Party doctrines and policy. I know, for example, that opposition to discrimination against the Negro people in housing, jobs, schools, etc., is a basic Communist Party doctrine. I also know that this policy and position is advocated and supported by the National Association for the Advancement of Colored People and hundreds of other organizations and individuals. Under the "Order of Supervision" am I proscribed from supporting and furthering such a policy? Does not the same rationale apply to opposing anti-Semitism and fighting for the equal rights of the Jewish people? Or advocating an armistice? —Or, truce in Korea?—Or, urging the repeal of the Smith and McCarran Acts? — Or, any of the innumerable views on social, economic and political problems of the day.

Under said Order, not only must I not support or further the doctrines of the Communist Party, but I must desist similarly from activity in relation to an "affiliate" thereof. No standard or guide is afforded me to determine which organization the defendant does now, or will in the future, deem an "affiliate" of the Communist Party.

Section 7 of the "Order of Supervision" imposes restrictions that would change my whole life, would seriously affect my liberty and deprive me of my earning power.

If I cannot associate with Communists, it means I cannot properly prepare and prosecute my appeal from the Smith Act conviction now pending in the Court of Appeals. My co-defendants, with whom I must consult and collaborate, are, obviously, known members of the Communist Party. This regulation, therefore, is tantamount to a denial of my right to take my appeal.

DARK PAGE B

[fol 457-487] To disassociate from "Communists" would, as well mean, that I must resign my job and give up social relationships of long standing.

Unless the temporary relief requested in the annexed order to show cause is granted, I will suffer irreparable injury. If I comply or attempt to comply—at my hazard—with the terms of the "Order of Supervision", I will, in effect, imprison myself, be forced to forego my livelihood and lawful social and business relations and cease the preparation of my appeal which is being jointly prosecuted with my ten other co-defendants. If I do not, and cannot comply, I run the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine.

No other demand for the relief requested herein has been made to any other court or judge thereat.

Wherefore, I pray that the relief reqeusted in the annexed "Order to Show Cause" be granted.

Alexander Bittleman.

Sworn to before me this 4th day of August, 1953. Blanch Freedman, Notary Public, State of New York. No. 31-6393650. Qualified in New York County. Certs. filed with N.Y. Co. Clk. & Reg. Commission Expires March 30, 1956.

[fol. 488] AFFIDAVIT OF BLANCH FREEDMAN—Filed August 7, 1953

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CLAUDIA JONES, Plaintiff

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant.

STATE OF NEW YORK,
County of New York, ss.:

BLANCH FREEDMAN, being duly sworn, deposes and says:

I am one of the attorneys for Claudia Jones, the plaintiff in the above-mentioned action and submit this affidavit in

E BLEED THRU

support of the motion for temporary relief as set forth in the foregoing Order to Show Cause.

The purport of the action is: (A) to secure a declaration as to the validity of (1) Section 242(d) of the Immigration and Nationality Act of 1952; (2) an "Order of Supervision" made against plaintiff on July 31, 1953 pursuant to said Section; (3) the regulations and restrictions upon the conduct of plaintiff incorporated in the said "Order of Supervision"; (B) to direct the defendant to set aside and cancel the said order; and (C) to enjoin and restrain defendant from requiring plaintiff to submit to the said order and its terms and conditions.

This affidavit is made by me as counsel rather than by plaintiff personally because plaintiff is presently convalescing at White Lake Lodge, White Lake, New York, from several attacks of cardiac failure and is not physically available to sign the affidavit.

I make this affidavit upon information and belief. The source thereof is my participation, as counsel for plaintiff in the deportation proceedings and related actions heretofore had herein; conversations had with the plaintiff relative to the contents of the complaint herein and this affidavit; and discussions had with the Immigration and Naturalization Service with regard to the aforesaid "Order of Super-
[fol. 489] vision." Plaintiff has been a legal resident of the United States since February 9, 1924, at which time she entered from the British West Indies at the age of 9 years.

She has been the subject of deportation proceedings since January 19, 1948, when she was served and arrested with a warrant of arrest for deportation. She was immediately released on bail. A final administrative order of deportation was entered therein on October 27, 1952, on the ground that after entry she was a member of the Communist Party of the United States.

She has been enlarged on administrative bail ever since the commencement of the said deportation proceeding against her, except for such times and such conditions as are more specifically set forth in paragraph "Eleventh" of the complaint in this action.

In June of 1951, she was arrested and indicted for conspiracy to violate the Smith Act (18 U.S.C. 2385). She was

DARK PAGE BL

tried before a court and jury in the U. S. District Court for the Southern District of New York, and in February, 1953 was convicted and sentenced to imprisonment for a year and a day. She has appealed from this conviction to the Court of Appeals for the Second Circuit, and presently is preparing and processing her appeal. She has been, since the commencement of the said proceedings, and is presently enlarged on bail in the sum of $20,000.

Plaintiff was born in Trinidad, British West Indies, on February 21, 1915. As stated above, she is under a prison sentence, so that, during the six months following the entry of the final administrative order for her deportation, she could not make any effort to depart from the United States, nor did the Immigration Service make any effort to deport her.

Under Section 242(d) of the Immigration and Nationality Act of 1952, the Immigration Service, by operation of law, has lost its power to detain plaintiff as a matter of "legislative policy in line with constitutional mandates." (Mezei v. Shaughnessy, 195 F. 2nd, 964, 968 rev'd on other grounds, 73 S. Ct. 625).

On July 31, 1953, plaintiff was served with an "Order of Supervision," made, in alleged pursuance of Section 242 (d) of the Immigration and Nationality Act of 1952, by the defendant, under authority granted him by Section 242.3(c) of the Immigration Nationality Regulations (8 C. F. R.). [fol. 490] This order imposes upon her a series of regulations of and restrictions upon her conduct and activity, as more specifically set forth in paragraph "Sixth" of the complaint herein, and Exhibit A annexed thereto.

The supervision exercised over plaintiff herein under the terms and conditions of the order is mere circumvention of the constitution and the law denying to the Attorney General and the defendant the right to imprison her. The physical restrictions upon her movements, the fetters upon her thinking and thoughts, her activities, and her way of making a living are removed from actual imprisonment in degree only, and not in kind or substance.

Since the defendant cannot keep plaintiff in physical custody at a place of detention subjected to his regulations of her conduct, how can it now be demanded that she be subjected in his unlimited discretion, to mental and physical

BLEED THRU

examinations. Plaintiff has never been ill wherein she has been unable to take care of herself without becoming a burden or danger to the community. Whenever ill, she has engaged her own physicians, paid for them and been treated as they and she saw fit to cure or alleviate her condition. And as for psychiatric examinations is it now to become the policy of the Immigration Service to lay the ground work for "brain washing" of political dissidents!

Since plaintiff cannot be imprisoned, on what lawful theory may her movements be limited to "a radius of fifty miles from Times Square" or require her to report at Ellis Island every Tuesday of her life? (except as more specifically set forth in Paragraph "Eleventh" of the Complaint herein)—or secure defendant's permission to move from New York State, across the river to New Jersey, or elsewhere? During all times that plaintiff has been at liberty under bond she has been amenable to process, always appearing before governmental authorities as requested and always honoring every condition of her bail bond. No reason exists to believe that she will not continue to do so, and plaintiff represents to this court that she will be available for deportation, or any lawful process or request of the government and, more specifically, of the defendant. Under the circumstances of her lawful employment and lawful normal routine of living, these conditions are harsh, unreasonable and abusive. The requirement of travelling to Ellis Island every Tuesday of her life is not mere inconvenience, it is a physical hardship, a drain upon her [fol. 491] energies, and a serious interference with her job and routine of work. (Plaintiff is presently on sick leave; but if she is forced to terminate her employment, her sick leave will likewise cease)

The "Order of Supervision" imposes upon her a virtual "house arrest," for which there is now lawful authorization. The fact that the boundaries of her "house" encompass "a radius of 50 miles from Times Square" does not negate the fact that the confinement prescribed is jail limits. The size of a house is not the essence of a "house arrest", it is the confinement to a circumscribed area.

The fact of the matter is, as the defendant well knows that in practice, plaintiff does not have the freedom of movement of a 50 mile radius.

DARK PAGE BL

The 50 mile radius proscribed in the order should permit her to go Southeast to Brooklyn and Long Island, West to New Jersey and Northwest to Connecticut. However, when read in conjunction with the jail limits imposed upon her by the District Court for the Southern District of New York the "Order of Supervision," in effect, permits her only to go 50 miles in one direction—due North. Hence, not only is the right to go to Brooklyn, New Jersey and Connecticut illusory, but the jail limits of the court are cut down by about 100 miles since the Southern District extends as far North as Hudson and includes all of Sullivan County —all of which is beyond the 50 mile radius limit of the "Order of Supervision" herein.

The regulations require that plaintiff give "information deemed fit and proper" in the unlimited discretion of the defendant, his representatives or agents. Such a regulation leaves the defendant free to demand of her information which in the present period of hysteria, if given, may be used to incriminate her. Other information may be such as relates to communications to family, doctor or lawyer, all of which *on* one has the legal right to extract from her. The defendant's general unlimited right to demand information is unreasonable in that it could constitute a serious breach of her right to privacy, and might put her in the degrading position of being an informer against other people. Certainly, defendant's power under this order extends to, and yet he has no right, to know, what plaintiff had for breakfast, whether she had an argument with her best friend, what friends she had dinner with, where she [fol. 492] went Saturday night, what she thinks of the municipal elections, the war in Korea, the 15 cents subway fare, or the prospect of an economic depression. Is the Service saying that the heart and mind of an alien is to be an open book any government official—high or petty—to read?

The order further directs her to:

> "(6) Terminate, and remain disassociated from, membership in, if any, support or other activity, of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or

BLEED THRU

geographical sub-division of any state, and section, subsidiary, branch, affiliate or sub-division of any such group or organization.

"(7) Refrain from association with any person, knowing or having reasonable ground to believe that such person is a member or affiliated with or is engaged in any promotion of the activities mentioned in Paragraph 6."

Plaintiff stated what she believe- to be the program and activities of the Communist Party before Hon. Edward J. Dimmock, a judge of this court and the trial judge in the Smith Act prosecution against her. She stated, in part:

"How can you decide to mete out justice for the only act to which I proudly plead guilty, and one, moreover, which by your own prior rulings constitutes no crime—that of holding Communist ideas; of being a member and officer of the Communist Party of the United States?

Will you measure, for example, as worthy of one year's sentence my passionate adherence to the idea of fighting for full unequivocal equality for my people, the Negro people, which as a Communist I believe can only be achieved allied to the cause of the working class?

A year for another vital Communist belief, that the bestial Korean war is an unjust war? Or my belief that peaceful co-existence of nations can be achieved and peace won if struggled for?

Another year for my belief that only under socialism will exploitation of man by man be finally abolished and the great human and industrial resources of the nation be harnessed for the wellbeing of the people?

Still another year's sentence for my belief that the denial of the exercise of free speech and thought to Communists only precedes, as history confirms the denial of the exercise of these rights."

• • • • • • •

"It was here on this soil that I early experienced experiences which are shared by millions of native-

DARK PAGE BLEE

born Negroes—the bitter indignity and humiliation of second-class citizenship, the special status which makes mockery of our Government's prated claims of a "free America" in a "free world" for 15 million Negro Americans.

It was out of Jim Crow experiences as a young Negro woman, experiences likewise born of working-class poverty that led be in my search of why these things had to be that led me to join the young Communist [fol. 493] League and to choose at the age of 18 the philosophy of my life, the science of Marxism-Leninism—that Philosophy that not only rejects racist ideas, but is the antithesis of them."

To this Judge Dimmock replied:

"You have not been convicted or sentenced for the things which you described when you addressed the Court before sentence. You have been convicted of and sentenced for a conspiracy to advocate and teach the duty and necessity of overthrowing and destroying the government of the United States by force and violence. If all that you had done were the things that you described in addressing the Court you would not have been convicted and would not have been sentenced."

Clearly, it is unreasonable to frame a regulation which could prohibit and subject to criminal prosecution the advocacy and teaching of doctrines which plaintiff understands to be those of Communist Party and which a Judge of this Court deemed to be lawful and a proper exercise of the right of freedom of thought and expression.

However, assuming arguendo their validity, the language in which they are drawn is so vague and of such indefiniteness in meaning, that it must be represented to this Court that plaintiff has no way of ascertaining precisely what it is she is being called upon to do and what it is she is being enjoined from doing.

Plaintiff is an employee of the Communist Party. She is the executive Secretary of the National Women's Commission. This involves research, writing articles, and lecturing on the Status, political, social and economic condi-

EED THRU

tions of women and the preparation of study materials on this subject for members of the Communist Party.

What does "disassociating" from the Communist Party (or other organizations listed) mean? What must plaintiff do to "disassociate"? Must she give up her job—her only source of livelihood?

The regulations directs that she do not "support" or further "the doctrines and policies of the Communist Party." Is her research, and are her writings to be considered proscribed "support" or "activity" in "furtherance of the doctrines and policies" of the Communist Party (or other listed organizations)? Plaintiff does not know what would be deemed, under the order, to be Communist Party doctrine or policy. She knows for example, that opposition to discrimination against the Negro people in housing, jobs, schools, etc., is a basic Communist Party doctrine. She knows that this policy and position is advocated and sup- [fols. 494-508] ported by the National Association for the Advancement of Colored People and hundreds of other organizations and all of the Negro people. Under the "Order of Supervision" is plaintiff proscribed from supporting and furthering such a policy? Would not the same rationale apply to advocating an armistice truce in Korea? —or urging the repeal of the Smith and McCarran Acts or any other of the innumerable views of social, economic and political problems of the day.

Under the said order, plaintiff not only must not support or further the doctrines of the Communist Party, but must desist similarly from activity in relation to an "affiliate" thereof. No standard or guide is afforded her to determine which organization the defendant now, or will in the future, deem an "affiliate" of the Communist Party.

Section 7 of the "Order of Supervision" imposes restrictions that seriously affects her liberty and deprives her of earning power.

If plaintiff cannot associate with Communists, it may mean she cannot properly prepare and prosecute her appeal from the Smith Act conviction now pending in the Court of Appeals. Her co-defendants, with whom she must consult and collaborate, are, obviously members of the Communist Party. This regulations, therefore, is tantamount to a denial of her right to appeal.

To disassociate from "Communists" would, as well mean, that plaintiff must resign her job (and sick leave at the present moment) and give up social relationships of long standing.

Unless the temporary relief requested in the annexed order to show cause is granted, plaintiff will suffer irreparable injury. If she complies or attempts to comply—at her hazard—with the terms of the "Order of Supervision," she will, in effect, imprison herself, be forced to forego her livelihood and sick leave and lawful social and business relations and cease the preparation of her appeal which is being jointly prosecuted with twelve other co-defendants. If plaintiff does not, and cannot comply, she runs the risk of immediate prosecution for a felony, carrying the penalty of one year in prison and $1,000 fine.

No other demand for the relief requested herein has been heretofore made to any other court or judge thereof. The affidavit and complaint herein was read to plaintiff over the telephone on 8/6/53 and this proceeding was authorized in her behalf.

Blanch Freedman.

Sworn to before me this 7th day of August, 1953. Gloria Agrin, Notary Public, State of New York. No. 24-5029100. Qualified in Kings County. Cert. filed with New York Co. Clerks. Cert. filed with Kings & N. Y. Rev. Offices. Term expires March 30, 1954.

[fol. 509] [File Endorsement Omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. 87-98

BETTY GANNETT, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

NOTICE OF MOTION TO DISMISS COMPLAINT—Filed Oct. 1, 1953

MESDAMES:

Please take notice that the undersigned will move this Court at a motion term thereof, to be held in the United States Court House at Foley Square, New York, N. Y., in Room 506 thereof, on October 6, 1953, at 10 A. M. on that date, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein pursuant to Rule 12(b) (6) and (7), of the Federal Rules of Civil Procedure, on the grounds that the complaint fails to state a claim upon which relief can be granted, and that the said complaint fails to join an indispensable party. A further motion will be made to vacate and dissolve the temporary restraining order herein pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y., September 29, 1053.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P. O. Address: United States Court House, Foley Square, Borough of Manhattan, City of New York.

To: Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff. Office & P. O. Address: 220 Broadway, New York, N. Y.

DARK PAGE B

[fol. 510] [File Endorsement Omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. 87-99

ALEXANDER BITTLEMAN, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

NOTICE OF MOTION TO DISMISS COMPLAINT—Filed Oct. 1, 1953

MESDAMES:

PLEASE TAKE NOTICE that the undersigned will move this Court at a motion term thereof, to be held in the United State Court House at Foley Square, New York, N. Y., in Room 506 thereof, on October 6, 1953, at 10 A. M. on that date, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein pursuant to Rule 12(b) (6) and (7), of the Federal Rules of Civil Procedure, on the grounds that the complaint fails to state a claim upon which relief can be granted, and that the said complaint fails to join an indispensable party. A further motion will be made to vacate and dissolve the temporary restraining order herein pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y., September 29, 1953.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P. O. Address: United States Court House, Foley Square, Borough of Manhattan, City of New York.

To: Blanch Freedman & Gloria Agrin, Attorneys for the Plaintiff. Office & P. O. Address: 220 Broadway, New York, N. Y.

E BLEED THRU

[fol. 511] [File Endorsement Omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. 87-124

CLAUDIA JONES, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

NOTICE OF MOTION TO DISMISS COMPLAINT—Filed Oct. 1, 1953

MESDAMES:

PLEASE TAKE NOTICE that the undersigned will move this Court at a motion term thereof, to be held in the United States Court House, Foley Square, New York, N. Y., in Room 506 thereof, on October 6, 1953, at 10 A. M. on that date, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein pursuant to Rule 12(b) (6) and (7), of the Federal Rules of Civil Procedure, on the grounds that the complaint fails to state a claim upon which relief can be granted, and that the said complaint fails to join an indispensable party. A further motion will be made to vacate and dissolve the temporary restraining order herein pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y., September 29, 1953.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P. O. Address: United States Court House, Foley Square, Borough of Manhattan, City of New York.

To: Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff. Office & P. O. Address: 220 Broadway, New York, N. Y.

DARK PAGE BLE

[fol. 512] [File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. 87-98

BETTY GANNETT, Plaintiff

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

Civ. 87-99

ALEXANDER BITTLEMAN, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

Civ. 87-124

CLAUDIA JONES, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

AFFIDAVIT IN OPPOSITION TO MOTIONS FOR TEMPORARY INJUNCTION AND IN SUPPORT OF MOTIONS TO DISMISS—Filed Oct. 14, 1954.

State of New York,
County of New York,
Southern District of New York, ss:

LESTER FRIEDMAN, being duly sworn, deposes and says that he is an attorney in the office of the District Counsel, New York District, Immigration and Naturalization Service, United States Department of Justice, and as such is fa-

LEED THRU

[fol. 513] miliar with the proceedings heretofore had herein. This affidavit is made in opposition to the respective motions of the plaintiffs for a temporary injunction and in support of the defendant's motions to dismiss the complaints on the grounds that such complaints fail to state claims upon which relief may be granted and the further ground that indispensable parties have been omitted from these proceedings though necessary parties thereto.

Although the complaints herein raise primarily issues of law which can be resolved by the Court without consideration of any facts not contained in the record herein, there are some aspects of these cases which require a classification of the facts, for which reason this affidavit is being submitted pursuant to the provisions of Rule 12(b) of the Rules of Civil Procedure which permits the presentation of facts by affidavit in support of a motion to dismiss the complaint for failure to state a claim, and which rule permits the Court to treat such a motion as if it were a motion for summary judgment.

The complaints herein begin with an attack upon the constitutionality of that portion of Section 242(d) of the Immigration and Nationality Act [8 U. S. C. 1252(d)], which provides for the release of deportable aliens when more than six months have elapsed after a final order of deportation on supervised parole under regulations prescribed by the Attorney General and which by statute are directed to include various provisions concerning the alien's appearance, submission to medical examination, giving of information under oath, and conforming to reasonable restrictions [fol. 514] on conduct and activities. The complaints then go on to allege that the regulations promulgated under the statute are equally unconstitutional, and, finally, it is claimed that the enforcement of the statute and regulations is unreasonable and violates the plaintiff's constitutional rights.

It is readily apparent that the allegations and prayer for relief in the respective complaints can be adjudicated on the questions of law presented. However, plaintiffs have accompanied their motions for a temporary injunction with affidavits setting forth scandalous and frivolous allegations of fact based on their absurd predictions as to how the Gov-

DARK PAGE BL

ernment intends to enforce the statute and regulations in question.

With respect to that portion of the statute which authorizes regulations requiring paroled aliens to submit to medical and psychiatric examination at the expense of the United States, if necessary, the plaintiffs have embarked upon a propaganda campaign having no reasonable connection with the law, regulations or manner in which it has been and will be enforced. The plaintiffs herein have been convicted of violation of the Smith Act in connection with conspiracy to overthrow the Government through their connection and activities in the Communist Party. They have also been ordered deported by reason of their membership and activities in behalf of the Communist Party. As can be expected from their fanatical adherence to the communist movement, they are using this action to continue their fantastic out-
[fol. 515] bursts of propaganda. On page 3 of the affidavit of Betty Gannett, verified August 4, 1953, it is claimed that the requirement of psychiatric examination is "now to become the Immigration Service policy to lay the ground work for 'brain washing' of political dissidents." This scandalous allegation closely parallels the propaganda material disseminated by the communists with respect to the Korean prisoners of war. In view of these false assertions, it is felt that the record herein should clearly show the purpose of the statute and the regulations and the manner in which it is being and is intended to be enforced.

The provision of the statute in question which pertains to medical and psychiatric examination of paroled aliens merely places into statutory form matters which have always been within the power of the Attorney General in connection with his general statutory power to deport. Most countries in the world will not accept a deportee without appropriate documents and medical certificates; of course, such requirements vary extensively from country to country. For example, Portugal, Pakistan and various South American countries require deportees to be accompanied by a medical document certifying that the subject has been vaccinated against smallpox; other countries require similar certificates showing vaccination or inoculation against other diseases, such as typhus and cholera, par-

BLEED THRU

ticularly when the aliens will be deported through other countries (in transit) wherein such diseases are common or prevalent. No alien could be deported unless the Attorney General has the power to require such alien to submit to medical examination for the purpose of issuing such certificates to accompany him. In addition, it has always been, as it is now, the practice to examine every alien who [fol. 516] is taken into detention for deportation for the alien's own protection and for the protection of other detainees. Obviously, it would be unfair to other detainees to permit an alien with a contagious disease to mingle freely with them at a detention facility To the same extent, the Immigration Service has a responsibility to detainees to protect them from other detainees who may be mentally ill and may become violent. Similarly, an alien who is mentally ill and predisposed to self-destruction must be placed in a position where adequate precaution and restraint may be imposed. If an alien is taken into custody and medically and psychiatrically examined, as aforesaid, he is generally not examined again prior to actual deportation unless such alien complains of illness and needs medical attention, or unless the alien by his conduct indicates some physical or mental illness which requires medical examination and possible treatment.

Finally, it is frequently necessary to examine aliens medically or psychiatrically prior to actual deportation because of the responsibility of the Government to transportation lines who accept such aliens as passengers for deportation; it is also necessary to examine aliens from time to time to ascertain whether they are physically fit to travel and whether such travel may endanger their health so that deportation may be stayed in proper cases. It is equally apparent that transportation lines should not be required to subject other passengers to association with an alien who has a contagious disease. Moreover, transportation lines will not accept a mentally ill passenger as a deportee unless he is accompanied by a medical attendant; the Government [fol. 517] can hardly determine the mental condition of a deportee and the possible necessity of a medical attendant if an examination cannot be conducted prior to embarkation.

It is not, never has been, and is highly unlikely that it

DARK PAGE BL

ever will be the Government's intention to give medical treatment to aliens who are on supervised parole, whether such treatment involves a physical or mental illness. Aliens are only treated at the Government's expense if they happen to be in actual detention; this situation cannot exist in the case of an alien who has been released on supervised parole. A significant and highly pertinent example of the medical examination provision in the statute can be found in one of the cases now before the Court. It should be noted that the order of supervision dated July 31, 1953, in the case of Claudia Jones (copy attached to plaintiff's affidavit and order to show cause), contains a modification in clause (4) so that the subject is required to report in writing rather than in person. An additional provision has also been added in clause (9), permitting that plaintiff to remain at a resort in New York State for the purpose of recuperating from an illness. Thus the requirement for medical examination may become necessary if an alien claims that he is too ill to report or comply with usual provisions of parole; the Immigration Service must, of course, be in a position to verify any claimed illness so that an alien may be excused from any conditions of parole which may interfere with such person's health. Again it is apparent that the conditions of parole in that case were not imposed for any vindictive purpose but solely to carry out the mandate of the statute, to assist in the Government's continued efforts to effectuate ultimate deportation and to protect the security of the United States without unnecessary harshness to the alien.

It is too apparent to require further comment that the [fol. 518] plaintiffs' contentions that they insist on being treated by their own physicians and will not submit to "brain washing" through psychiatric treatment are utter nonsense and undoubtedly stem from the usual Communist Party "line".

Another factual matter has been presented in plaintiffs' supporting affidavits with respect to that portion of the statute here under consideration which requires an alien under supervised parole to give information under oath as to nationality, circumstances, habits, associations and activities, and such other information as the Attorney General

BLEED THRU

may deem fit and proper. What becomes glaringly apparent in these cases is that none of the plaintiffs have as yet been required to appear and give any information under that portion of the statute and regulations. Therefore, plaintiffs are hardly in a position to complain concerning any unreasonable requests for information; but this does not stop them. They pretend that possibly, at some future date, some government official may direct them to answer incriminating questions in violation of their constitutional rights. They suggest that the government intends to ascertain their conversations between their spouses, doctors or lawyers; they even go so far as to pretend that the Government will be interested in what they ate for breakfast; what they think of municipal elections, the fifteen cent subway fare, or their predictions of the future economic status of the country. (See p. 4 of the affidavit of Betty Gannett, verified August 4, 1953.) Again, it is apparent that the allegations are fanciful and conjectural and are intended to convey an erroneous impression concerning allegedly harsh enforcement of a statute, when, in fact, no enforcement of such statute has been undertaken. Here, too, we feel that some clarifying information should be furnished to the court.

[fol. 519] In every case known to the undersigned, aliens under supervised parole have been called in to give information concerning themselves primarily because a foreign government has requested additional information in connection with its consideration of the government's application to accept such alien as a deportee. In many cases foreign consuls may ask for additional information concerning the names of an alien's parents, the foreign spelling of the name, the date when he left the foreign country, facts concerning the alien's military services abroad, or any other data which may assist the foreign government in identifying the alien as a national or lawful resident of such country. In addition, many aliens do not wish to return to the country of their nationality and apply as they are permitted to do under the law, for visas to other countries to which they wish to migrate as immigrants. When visa applications are made, the foreign countries frequently request information for their assistance in ruling on the visa applications. If the information is not contained in

DARK PAGE BL

a government record, the alien may be asked to furnish the information to the Immigration Service or directly to the foreign consulate. In addition, it is noted that Section 242(e) of the Immigration and Nationality Act [8 USC 1252(e)] requires certain classes of aliens to make efforts to depart from the United States and to apply for travel documents. In this connection, it may be necessary to ascertain from aliens what efforts they have made along these lines. This court is assured that the government has no interest in what food an alien eats, what private conversa-[fol. 520] tions he has had with his attorney or doctor, or spouse, nor can the government constitutionally require that any alien respond to questions which may tend to incriminate him. Thus it is again apparent that plaintiffs have attempted to create a fictitious monster to which they now point as a basis for raising constitutional questions which are purely academic, have not arisen and are not likely to arise.

Although reference in this affidavit has been made to the supporting affidavit of Betty Gannett, verified August 4, 1953, it is noted that similarly frivolous and scandalous allegations are contained in the affidavit of Alexander Bittleman, verified August 4, 1953, and again repeated in the affidavit of counsel in connection with the motion in behalf of the plaintiff, Claudia Jones, verified by counsel on August 7, 1953.

Wherefore, it is respectfully prayed that plaintiffs' motions for temporary injunctions be denied in all respects and that respondent's motions to dismiss the complaints be granted.

(S.)Lester Friedman, Attorney, Imm. & Nat. Service.

Sworn to before me this 1st day of October, 1953. (S.) Charles M. Lee, Notary Public, State of New York, No. 03-2289850. Qualified in Bronx County. Cert. Filed with Clerks of Bronx and N. Y. Counties and Register's. Term Expires March 30, 1955.

BLEED THRU

[fol. 521] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 93-228

BORRIS SKLAR, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

NOTICE OF MOTION TO DISMISS COMPLAINT, ETC.—Filed June 3, 1954

MESDAMES:

Please Take Notice that the undersigned will move this Court at a Motion Term thereof to be held in the United States Court House, Foley Square, New York, N. Y., in Room 506 thereof, on June 8, 1954, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein pursuant to Rule 12 (b)(6) and (7) of the Federal Rules of Civil Procedure, on the grounds that the complaint fails to state a claim upon which relief can be granted and that the said complaint fails to join an indispensable party to this action. A further motion will be made to vacate and dissolve the temporary restraining order herein pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Title 28, United States Code, Section 2284(3). Finally, an application will be made for the appointment of a three-Judge Court to hear and determine the matters herein in issue in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, and for such other and further relief as the Court may deem just and proper.

[fol. 522] Dated: New York, N.Y., June 1, 1954.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P.O. Address:

DARK PAGE BL

United States Court House, Foley Square, New York 7, N. Y.

To: Blanche Freedman and Gloria Agrin, Esqs., Attorneys for Plaintiff. 220 Broadway, New York, N. Y.

[fol. 523] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 93-285S

MICHAEL NUKK, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

Civ. 93-286S

FRANK BORICH, Plaintiff,

v.

SAME, Defendant

Civ. 93-287S

JOSEPH SIMINOFF, Plaintiff,

v.

SAME, Defendant

Civ. 93-288S

FELIX KUSMAN, Plaintiff,

v.

SAME, Defendant

BLEED THRU

Civ. 93-289S

ROSE LIGHTCAP, Plaintiff,

v.

SAME, Defendant

[fol. 524] Civ. 93-290S

IDA GOTTESMAN, Plaintiff,

v.

SAME, Defendant

Civ. 93-291S

ANNA TAFFLER, Plaintiff,

v.

SAME, Defendant

Civ. 93-292S

BENNY SALTZMAN, Plaintiff,

v.

SAME, Defendant

Civ. 93-293S

BESSIE GEISER, Plaintiff,

v.

SAME, Defendant

Civ. 93-294S

MARTIN YOUNG, Plaintiff,

v.

SAME, Defendant

NOTICE OF MOTION TO DISMISS, ETC.—Filed October 15, 1954

MESDAMES:

Please Take Notice that the undersigned will move this Court at a Motion Term thereof to be held in the United

DARK PAGE

States Court House, Foley Square, New York, N. Y. in Room [fol. 525] 506 thereof, on June 8, 1954, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaints herein pursuant to Rule 12(b)(6) and (7) of the Federal Rules of Civil Procedure, on the grounds that the complaints fail to state a claim upon which relief can be granted and that the said complaints fail to join an indispensable party to these actions. A further motion will be made to vacate and dissolve the temporary restraining orders herein pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Title 28, United States Code, Section 2284(3). Finally, an application will be made for the appointment of a three-Judge Court to hear and determine the matters herein in issue in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y., June 4, 1954.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P. O. Address: United States Court House, Foley Square, New York 7, N. Y.

To Blanche Freedman and Glorida Agrin, Esqs., Attorneys for Plaintiffs, 220 Broadway, New York, N. Y.

[fol. 526] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

File in Civ. 93-228

Reply Affidavit

Civ. 93-285S

MICHAEL NUKK, Plaintiff,

v.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

Civ. 93-286S

FRANK BORICH, Plaintiff,

v.

SAME, Defendant

Civ. 93-287S

JOSEPH SIMINOFF, Plaintiff,

v.

SAME, Defendant

Civ. 93-288S

FELIX KUSMAN, Plaintiff,

v.

SAME, Defendant

Civ. 93-289S

ROSE LIGHTCAP, Plaintiff,

v.

SAME, Defendant

DARK PAGE

[fol. 527] Civ. 93-290S

IDA GOTTESMAN, Plaintiff,

v.

SAME, Defendant

Civ. 93-291S

ANNA TAFFLER, Plaintiff,

v.

SAME, Defendant

Civ. 93-292S

BENNY SALTZMAN, Plaintiff,

v.

SAME, Defendant

Civ. 93-293S

BESSIE GEISER, Plaintiff,

v.

SAME, Defendant

Civ. 93-294S

MARTIN YOUNG, Plaintiff,

v.

SAME, Defendant

Civ. 93-228S

BORIS SKLAR, Plaintiff,

v.

SAME, Defendant

[fol. 528] AFFIDAVIT OF BLANCH FREEDMAN

STATE OF NEW YORK,

County of New York, ss.:

BLANCH FREEDMAN being duly sworn, deposes and says:

I am one of the attorneys for the plaintiffs in the above entitled action. I am fully cognizant of all the facts and

AGE BLEED THRU

proceedings heretofore had herein and I submit this affidavit in opposition to the defendant's motions to vacate the temporary restraining orders duly made and entered herein by Judge Sylvester J. Ryan, in all except the Sklar case, and by Judge David N. Edelstein in the latter.

I respectfully submit to this court that the said stays should be continued *as ordered* pending the hearing and determination of the applications herein for interlocutory judgments. Each restraining order and the affidavit of each plaintiff upon which the said order is predicated, clearly establishes irreparable injury and grievous damage to the property and person of the named plaintiffs. The granting of each restraining order herein represents a finding of these facts and is the considered thinking and judgment of said two judges of this court that plaintiffs, unless relieved as prescribed in said orders, would suffer irreparable harm.[1]

Defendant's motion to vacate is in effect an attempt to reargue the determinations of Judge Ryan and Judge Edelstein. However, the defendant has offered to this court no additional facts to justify or warrant a reversal of the decision of the aforesaid judges. Defendant's motions are unsupported by any shred of evidentiary matter. The plaintiffs' affidavits are uncontested; indeed, defendant has [fol. 529] interposed no affidavits in opposition to plaintiffs' affidavits herein.

Instead, defendant has endeavored merely to interpolate plaintiffs' affidavits and in this somantic exercise has reached conclusions that have no basis in fact. A perusal of the affidavits herein clearly reveals that contrary to the defendant's contention, Judge Ryan and Judge Edelstein had every reason to find that there are grievious deprivations of property rights herein, that the livelihood of the plaintiffs herein are affected and in jeopardy.

The burden of defendant's argument to this court is that the temporary restraining orders irreparably injure the

---

[1] Judges Dimock and Weinfeld reached the same conclusion and granted more extensive stays in the similar cases of Gannett, Bittelman, and Jones V. Shaughnessy. (Civ. 87-98; Civ. 87-99; Civ. 87-124).

DARK PAGE

government in that "restraining order places plaintiffs in a position to commit crimes against the United States and urge their right to do so by leave of this Court." (Defendant's Memorandum, p. 16). This is arrant nonsense! No grand jury or United States Attorney has been enjoined from prosecuting these plaintiffs for the commission of any crime.

Furthermore, with respect to the ten restraining orders made by Judge Ryan, paragraphs numbered 6, 7 and 8 (or 5a, b and c) of the Orders of Supervision to which defendant is obviously referring, *have not been restrained.* Hence, the issue as to these ten cases is a false one.

In relation to the plaintiff Sklar, wherein Judge Edelstein did enjoin enforcement of these provisions, the affidavit of Sklar demonstrated a very special situation which the Judge concluded warranted such restraint, and which, in fact, does.

WHEREFORE, it is respectfully submitted that the tem-
[fol. 530] porary restraining orders of Judge Ryan and Judge Edelstein should not be disturbed and that the defendant's motions to vacate said orders be denied.

(S.) Blanch Freedman.

Sworn to before me this eighth day of June, 1954.
(S.) Samuel J. Singer, Notary Public, State of New York, No. 31-9023300. Qualified in New York County. Commission Expires March 30, 1956.

.EED THRU

[fols. 531-532] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 87-98

BETTY GANNETT

v.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York, Defendant

NOTICE OF MOTION TO DISMISS, ETC.—Filed June 10, 1954

MESDAMES:

PLEASE TAKE NOTICE that on the complaint herein, and in particular on the basis of paragraph "Seventh" thereof, alleging the unconstitutionality of Section 242(d) of the Immigration and Nationality Act of 1952, and on all the proceedings heretofore had herein, the undersigned will move this Court, at a term for motion thereof, to be held at the United States Court House, Foley Square, New York, New York, in Room 506, on June 15, 1954, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard, for an order convening a three judge court to hear and determine the matters herein in issue in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, and for such other and further relief as to this Court may appear just and proper. Dated: New York, N. Y., June 9, 1954.

Yours, etc., (S.) J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

To: Blanche Freedman & Gloria Agrin, Esqs., Attorneys for Plaintiff, 220 Broadway, New York, N. Y.

DARK PAGE BL

[fols. 533-534] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 87-99

ALEXANDER BITTLEMAN

v.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York, Defendant

NOTICE OF MOTION TO DISMISS, ETC.—Filed June 10, 1954

MESDAMES:

PLEASE TAKE NOTICE that on the complaint herein, and in particular on the basis of paragraph "Seventh" thereof, alleging the unconstitutionality of Section 242(d) of the Immigration and Nationality Act of 1952, and on all the proceedings heretofore had herein, the undersigned will move this Court, at a term for motion thereof, to be held at the United States Court House, Foley Square, New York, New York, in Room 506, on June 15, 1954, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard, for an order convening a three judge court to hear and determine the matters herein in issue in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, and for such other and further relief as to this Court may appear just and proper.

Dated: New York, N. Y., June 9, 1954.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

To: Blanche Freedman and Gloria Agrin, Esqs., Attorneys for Plaintiff, 220 Broadway, New York, N. Y.

BLEED THRU

[fols. 535-536] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 87-124

CLAUDIA JONES

v.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York, Defendant

NOTICE OF MOTION TO DISMISS, ETC.—Filed June 10, 1954

MESDAMES:

PLEASE TAKE NOTICE that on the complaint herein, and in particular on the basis of paragraph "Seventh" thereof, alleging the unconstitutionality of Section 242(d) of the Immigration and Nationality Act of 1952, and on all the proceedings heretofore had herein, the undersigned will move this Court, at a term for motion thereof, to be held at the United States Court House, Foley Square, New York, New York, in Room 506, on June 15, 1954, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard, for an order convening a three judge court to hear and determine the matters herein in issue in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, and for such other and further relief as to this Court may appear just and proper.

Dated: New York, N. Y. June 9, 1954.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant. Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

To: Blanche Freedman and Gloria Agrin, Esqs., Attorneys for Plaintiff, 220 Broadway, New York, N. Y.

DARK PAGE

[fol. 537] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 93-285S
Civil 93-286B
Civil 93-287S
Civil 93-288B
Civil 93-289S
Civil 93-290B
Civil 93-291S
Civil 93-292B
Civil 93-293S
Civil 93-294B
Civil 93-228B

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, Defendant

and

Civil 87-98B
Civil 87-99S
Civil 87-124B

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York, Defendant

ORDER CONVENING THREE-JUDGE COURT—June 21, 1954

Pursuant to the authority vested in me by Title 28, United States Code § 2284, I do hereby designate and constitute

the Statutory Court of three Judges constituted of Hon. Harold R. Medina, Circuit Judge, and Hon. John F. X. McGohey and Hon. Edward Weinfeld, District Court Judges, to hear the above-entitled causes, at such time as may be designated by the said Court.

Harrie B. Chase, Chief Judge of the United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., June 21st, 1954.

[fol. 538] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 87-98B
Civil 87-99S
Civil 87-124B

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York, Defendant.

ORDER DIRECTING HEARING BY THREE-JUDGE COURT—June 21, 1954

A motion having been made to which no opposition was offered that a Statutory Court be convened pursuant to Title 28, United States Code § 2284, to hear the above-entitled causes, and it appearing that the issues presented therein require the convening of a Statutory Court as provided for by said section and also § 2282 of Title 28, United States Code, and the undersigned having given notice to and requested of the Hon. Harrie B. Chase, Chief Judge of the United States Court of Appeals for the Second Circuit, that he designate such Statutory Court to hear and determine the application made by the plaintiffs herein, and Chief

DARK PAGE

Judge Chase having designated the Hon. Harold R. Medina, a Judge of the United States Court of Appeals for the Second Circuit, and the Hon. John F. X. McGohey, a Judge of the United States District Court for the Southern District of New York, and the undersigned, to constitute a Special Court as required by law, and it is hereby

ORDERED that said Judges shall constitute such Court to hear and determine these causes and to act in all matters pertaining thereto as provided by law, and it further ap- [fol 539] pearing that the issues in the above-entitled causes are substantially similar to those presented in Nukk v. Shaughnessy, District Director, Civil 93-285, et al., wherein a Statutory Court has likewise been convened consisting of the same Judges designated to hear the above-entitled causes, it is further

ORDERED that all such causes be heard together and that they be set for argument at the United States Court of Appeals, Room 1705, United States Court House, Foley Square, New York City, on June 30, 1954, at 10:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard; and it is further

ORDERED that the Clerk of the United States District Court for the Southern District of New York shall furnish notice of the aforesaid to the Attorney General of the United States, to the United States Attorney for the Southern District of New York, and to the respective parties at least five days prior to the time fixed for said hearing.

Edward Weinfeld, United States District Judge.

Dated: New York, N. Y., June 21, 1954.

E BLEED THRU

[fol. 540] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 93-285S, 93-286B, 93-287S, 93-288B, 93-289S, 93-290B, 93-291S, 93-292B, 93-293S, 93-294B, 93-228B File

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, Rose Lightcap, Ida Cottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

ORDER DIRECTING HEARING BY THREE-JUDGE COURT—June 23, 1954

A motion having been made to which no opposition was offered that a Statutory Court be convened pursuant to Title 28, United States Code § 2284, to hear the above-entitled causes, and it appearing that the issues presented therein require the convening of a Statutory Court as provided for by said section and also § 2282 of Title 28, United States Code, and the undersigned having given notice to and requested of the Hon. Harrie B. Chase, Chief Judge of the United States Court of Appeals for the Second Circuit, that he designate such Statutory Court to hear and determine the application made by the plaintiffs herein, and Chief Judge Chase having designated the Hon. Harold R. Medina, a Judge of the United States Court of Appeals for the Second Circuit, and the Hon. Edward Weinfeld, a Judge of the United States District Court for the Southern District of New York, and the undersigned, to constitute a Special Court as required by law, and it is hereby

ORDERED that said Judges shall constitute such Court to hear and determine these causes and to act in all matters pertaining thereto as provided by law, and it further [fol. 541] appearing that the issues in the above-entitled causes are substantially similar to those presented in

DARK PAGE BI

Gannett v. Shaughnessy, District Director, Civil 87-98, et al., wherein a Statutory Court has likewise been convened consisting of the same Judges designated to hear the above-entitled causes, it is further

ORDERED that all such causes be heard together and that they be set for argument at the United States Court of Appeals, Room 1705, United States Court House, Foley Square, New York City, on June 30, 1954, at 10:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard; and it is further

ORDERED that the Clerk of the United States District Court for the Southern District of New York shall furnish notice of the aforesaid to the Attorney General of the United States, to the United States Attorney for the Southern District of New York, and to the respective parties at least five days prior to the time fixed for said hearing.

Dated: New York, N. Y., June 23, 1954.

John F. X. McGohey, United States District Judge.

BLEED THRU

[fol. 542] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 93-285S, 93-286B, 93-287S, 93-288B, 93-289S, 93-290B, 93-291S, 93-292B, 93-293S, 93-294B, 93-228B

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

and

Civil 87-98B File, 87-99S, 87-124 B

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service of the Port of New York, Defendant

NOTICE OF APPOINTMENT OF THREE-JUDGE COURT—June 23, 1954

SIRS:

Pursuant to the provision of Title 28, United States Code, Section 2284, you are hereby notified that by order of the Honorable Edward Weinfeld, dated June 21, 1954 and by order of the Honorable John F. X. McGohey, dated June 23, 1954, a hearing has been set by a three-judge court composed of Honorable Harold R. Medina, Honorable Edward Weinfeld, and Honorable John F. X. McGohey, for the 30th day of June, 1954, Room 1705, at 10:30 A.M., at the

DARK PAGE BLEE

United States Court House, Foley Square, New York City.
Dated: New York, N. Y., June 23, 1954.

William V. Connell, Clerk of the Court.

[fol. 543] To: Honorable Herbert Brownell, Jr., Attorney General of the United States Department of Justice, Washington 25, D. C.

Honorable J. Edward Lumbard, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, N. Y.

Blanche Freedman and Gloria Agrin, Attorneys for Plaintiff, 220 Broadway, New York, N. Y.

Form 3806-S (Rev. 2-52)

Receipt for Registered Article No. 376239

Postmaster per

Fee paid 30 cents. Class postage

Declared value NV Surcharge paid, $

Return Receipt fee Spl. Del'y fee

Delivery restricted to addressee:

In person, or order Fee paid

Accepting employee will place his *initials* in space indicating restricted delivery.

NEW YORK, N.Y. POSTMARK JUN 23 1954 KNICKERBOCKER STA.

NOTICE TO SENDER—Enter below name and address of addressee as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Hon. Herbert Brownell Jr.

(Name of addressee) (P. O. and State of address)

Form 3806-S (Rev. 2-52)

Receipt for Registered Article No. 376240

Postmaster per

Fee paid 30 cents. Class postage

Declared value NV Surcharge paid, $

Return Receipt fee Spl. Del'y fee

Delivery restricted to addressee:

In person, or order Fee paid

Accepting employee will place his *initials* in space indicating restricted delivery.

NEW YORK, N.Y. POSTMARK JUN 23 1954 KNICKERBOCKER STA.

NOTICE TO SENDER—Enter below name and address of addressee as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Blanche Freedman + Gloria Agrin

(Name of addressee) (P. O. and State of address)

THRU

[Fol. 544] [File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285S, 93-286S, 93-287S, 93-288S, 93-289S, 93-290S, 93-291S, 93-22S, 93-293S, 93-294S, 93-228S

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX Kusman, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

Civ. No. 87- 98S.
87- 99S.
87-124S.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

SUPPLEMENTAL AFFIDAVIT OF LESTER FRIEDMAN—Filed Oct. 15, 1954

State of New York,
County of New York, Southern District of New York, ss.

LESTER FRIEDMAN, being duly sworn, deposes and says that he is the same person who verified the affidavit submitted in the Gannet, Bittelman and Jones cases and makes this affidavit to supplement the information contained therein.

Plaintiffs have attempted to exaggerate the harshness of the parole conditions upon themselves by asserting that they face the continuation of such conditions for the rest of their lives. It is this contention that warrants responsive com- [fol. 545] ments.

DARK PAGE BLE

First it should be pointed out that plaintiffs need continue to comply with the conditions of supervised parole only as long as they remain in the United States and that the burden to depart and to make efforts to depart is upon plaintiffs. In fact, it is a violation of the penal provisions of Section 242(e) to fail to depart or to make timely application in good faith for travel documents. The latter statute has already been upheld as constitutional by the United States Supreme Court in the *Spector* case, cited on page 39 of the defendant's brief. Thus, it is apparent that plaintiffs may readily terminate their supervised parole by merely departing from the United States as they are required to do by law. Of course, they contend that no country will accept them. With this contention we also disagree.

It has been the experience of the Immigration and Naturalization Service that the so called "iron curtain" countries readily and consistently accept subversive deportees when it serves the mutual purpose of the alien and the foreign government involved. It is apparent that the question of which alien is accepted and which alien is refused is a pure matter of collusive action between the alien and the government involved. For example, Russia has actually accepted two deportees in recent years to the knowledge of the undersigned; Poland has accepted a large number of deportees and smaller numbers have been accepted by almost all of the satellite countries of Soviet Russia. In each case wherein the alien was accepted, such alien has actually wanted to depart and has had some strong motivation to depart. Again, to cite examples, Gerhardt Eisler escaped from the United States to avoid criminal prosecution and was accepted; other cases which have reached the Courts such as *Figueiredo* and *Harisiades* were accepted because they were deportable to anti-communist countries and appar- [fols. 546-554] ently did not wish to risk possible prosecution for subversive activities in such countries.

Finally, it need only be pointed out as Judge Dimock stated in the case of *U. S. ex. rel. Blankenstein* v. *Shaughnessy*, S. D. N. Y., Dec. 2, 1953, Civ. 86-311, that it cannot be known what agreement or arrangements of an international nature can be made in the future or in the immediate future for the acceptance of deportees such as the plaintiffs. To assume that plaintiffs will never be deported would be

BLEED THRU

as erroneous as the assumption that they will all be deported tomorrow. Such considerations are within the realm of pure prophecy and speculation and should not enter the deliberations of this Court.

Lester Friedman.

Sworn to before me this 30th day of June, 1954. Charles M. Lee, Notary Public, State of New York, No. 03-2289850. Qualified in Bronx County. Cert. Filed with Clerks of Bronx and N. Y. Counties and Register. Term Expires March 30, 1955.

[fols. 555-556] [File endorsement omitted]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

NUKK et al, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, etc., Defendant.

NOTICE OF SETTLEMENT AND ORDER MODIFYING TEMPORARY RESTRAINING ORDER—July 27, 1954

SIR:

PLEASE TAKE NOTICE that the within counter-order will be presented for settlement and signature to the Honorable Harold Medina, United States Circuit Judge, at the office of the Clerk, Room 601, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 22nd day of July, 1954, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated: New York, N. Y.
July 21, 1954

Yours, etc., Blanch Freedman & Gloria Agrin, Attorneys for plaintiffs, 220 Broadway, Borough of Manhattan, City of New York.

To: J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant, Office & P. O. Address, United States Court House, Foley Square, Borough of Manhattan, City of New York.

DARK PAGE E

[fol. 557] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285 S, 93-286 B, 93-287 S, 93-288 B, 93-289 S, 93-290 B, 93-291 S, 93-292 B, 93-293 S, 93-294 B, 93-228 B

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

ORDER

The plaintiffs having moved by orders to show cause for temporary injunctions against the defendant in these actions; and the Court having issued a temporary restraining order against the defendant on May 25, 1954, restraining the defendant from requiring the plaintiff, Sklar, to submit to supervision as required by the "Order of Supervision" made by the defendant against him; and the Court having issued temporary restraining orders against the defendant on June 2, 1954 restraining the defendant from [fol. 558] requiring the plaintiffs, Nukk and nine others, to submit to supervision as required by paragraphs 2 and 4 of the "Orders of Supervision" made by the defendant against them; and the defendant having moved to dismiss the complaints in these actions and having made an application to vacate the said restraining orders herein; and the said application of the defendant having come on to be heard before a statutory court duly convened pursuant to the provisions of Title 28, United States Code, Section 2284 on June 30, 1954; and J. Edward Lumbard, United States Attorney for the Southern District of New York [Harold R. Tyler, Jr., Assistant United States Attorney, of counsel), attorney for the defendant, having been heard in support of the defendant's application to vacate the outstanding temporary restraining orders, and Blanch Freedman and Gloria Agrin, Attorneys for plaintiffs, hav-

E BLEED THRU

ing been heard in opposition thereto, and due deliberation having been had thereon, and upon all the proceedings heretofore had herein, it is, pending the determination of the plaintiffs' motions for temporary injunctions and the defendant's cross motions to dismiss the complaint herein,

ORDERED that the defendant's application to vacate the aforesaid temporary restraining orders is denied, except that

(1) the defendant shall not be restrained from enforcing Paragraph 2 of the said "Orders of Supervision" to the extent that the plaintiffs may be required to submit to medical or psychiatric examination if it is necessary to effectuate deportation arrangements or if it is necessary to verify any claimed disability upon which the plaintiffs, or any of them, may make administrative application for a modification of any other [fol. 559] of the conditions of the said "Orders of Supervision" by reason of an alleged physical inability to comply therewith; and

(2) the defendant shall not be restrained from enforcing Paragraph 4 of the said "Orders of Supervision" to the extent that the plaintiffs may be required to report in person not more than once per month to the officer in charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor;

and it is further

ORDERED that the defendant may administratively amend the said "Orders of Supervision" to conform to this order.

Dated: New York, N. Y., July 27, 1954.

John F. X. McGohey, U. S. C. J.

DARK PAGE BL

[fol. 560] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285 S, 93-286 B, 93-287 S, 93-288 B, 93-289 S, 93-290 B, 93-291 S, 93-292 B, 93-293 S, 93-294 B, 93-228 B

MICHAEL NUKK, FRANK BORACH, JOSEPH SIMINOFF, FELIX KUSMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

Civ. No. 87-98 B, 87-99 S, 87-124 B

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

DECISION AND ORDER OF THREE-JUDGE COURT—October 11, 1954

Before: Medina, Circuit Judge, and McGohey and Weinfeld, District Judges

Blanch Freedman & Gloria Agrin, Attorneys for Plaintiffs.

J. Edward Lumbard, United States Attorney, Attorney for Defendant; Harold R. Tyler, Jr., Harold J. Raby, Assistant United States Attorneys and Lester Friedman, Attorney, Immigration and Naturalization Service, of Counsel.

[fol. 561] MEDINA, Circuit Judge:

The pleadings and issues in the fourteen actions before us are substantially the same. Each of the plaintiffs is an

BLEED THRU

alien who has been ordered deported from the United States after appropriate administrative proceedings which none has sought to review by any judicial proceeding. The order of deportation in each case was based on an administrative finding that, after entering the United States, the plaintiff had been a member of the Communist Party of the United States. Final orders and warrants for the deportation of each of the plaintiffs have been outstanding for more than six months.

Three of the plaintiffs, namely, Gannet, Bittleman and Jones, have not been deported primarily because they were tried and convicted of violations of the penal provisions of the Smith Act for conspiring to advocate the overthrow of the United States Government by force and violence. These plaintiffs have been sentenced to various terms of imprisonment and are now at liberty on judicial bond pending their appeals in the criminal action. With respect to the other eleven plaintiffs, they have not been deported by reason of the inability of the immigration authorities physically to effectuate deportation. Some of the plaintiffs are so-called "stateless persons"; others have been denied, temporarily at least, readmittance to the countries of their nativity or last residence prior to coming to the United States.

Since more than six months have elapsed from the entry of the final orders of deportation, the defendant has re- [fols. 562-565] leased the plaintiffs from custody on supervised parole in accordance with the express provisions of Section 242(d) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1252(d),[1] and the regulations promulgated

---

[1] Section 242(d) of the Immigration and Nationality Act of 1942, 8 U. S. C. § 1252(d), provides as follows:

"(d) *Supervision of deportable alien; violation by alien.*

Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include pro-

thereunder, 8 C. F. R. § 242.3(c),[2] the constitutionality of which plaintiffs now seek to attack.

As may be seen, the regulations which have been promul-

---

visions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

[2] 8 C. F. R. § 242.3(c) provides as follows:

"(c) *Release; supervision after six months' period has expired; warning of penal provisions.*

An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242 (d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or

gated under Section 242(d) of the Immigration and Nationality Act of 1952 closely follow the statutory language. Likewise, the orders of supervision pursuant to which the plaintiffs were released from custody on supervised parole substantially follow the language of the statute and the regulations, with the exception of certain restrictions with respect to plaintiffs' activities.[3] Although all of the plaintiffs have been notified by the defendant of the conditions of

---

intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

[3] The orders of supervision regulated and restricted the conduct and activity of each of the plaintiffs substantially as follows:

"Therefore, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change

DARK PAGE BI

their parole under Section 242(d), they have refused to sign the written orders of supervision, copies of which are attached to their respective complaints.

Since the time of the plaintiffs' release from the custody of the defendant on supervised parole, no action of any kind with respect to any of the plaintiffs has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action.

---

place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (Person) on Thursday of each week, bet. 8:45 A. M. & 3:45 P. M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

(5)(a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from 'associating' with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the 'Smith' Act of June 25, 1948 Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of

BLEED THRU

Following the issuance of the orders of supervision, the plaintiffs commenced these actions in this Court, each respectively seeking a declaratory judgment and injunctive relief. The complaints ask that a declaratory judgment be made and entered declaring that Section 242(d) of the Immigration and Nationality Act of 1952, the regulations [fol. 566] promulgated thereunder, and the orders of supervision issued against the plaintiffs, are all "unconstitutional, invalid, illegal, void and inoperative," and declaring that the particular provisions of the orders of supervision "are unreasonable and an abuse of discretion." The complaints further demand that an order be made and entered directing the defendant to set aside and cancel the orders of supervision, and that the defendant be enjoined from requiring the plaintiffs to obey the conditions of their supervised parole as contained in the orders of supervision.

The plaintiffs have moved, by means of orders to show cause issued at the same time the various complaints were filed, for temporary injunctions against the defendant pending the hearing and determination of the actions. In all cases, temporary restraining orders were issued by single judges of this Court, relieving plaintiffs from any obligation of compliance with the varying provisions of the orders of supervision, pending the hearing and determination of the plaintiffs' motions for temporary injunctions.

The defendant has cross-moved with respect to all fourteen complaints, asking the Court for an order (1) dismissing all of the complaints herein, pursuant to Rule 12(b) of the Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving the tempo-

50 miles from Times Square, New York, N. Y. without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District."

The orders of supervision vary in certain unimportant respects, *e. g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted.

rary restraining orders herein pursuant to Rule 65(b) of the Rules of Civil Procedure and Title 28, United States Code, Section 2284(3); and (3) appointing a three-judge Court, in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, to hear and determine [fol. 567] the matters herein in issue.

The plaintiffs' attorneys offered no opposition to the defendant's application for the appointment of a three-judge Court, and, accordingly, on June 21, 1954, this statutory Court was designated in accordance with the appropriate provisions of Title 28, United States Code, Section 2284. All of these actions, including the various motions, were heard together on June 30, 1954, pursuant to orders of this Court, dated June 21, 1954, and June 23, 1954, respectively, and extensive arguments were made by counsel for both sides. On July 27, 1954, the temporary restraining orders referred to above were modified in certain similar respects by an order of this Court, and, as so modified, continue to be outstanding against the defendant in all the cases.

The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate;[4] and it has long been settled law that the constitutional powers of the federal courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do.

The District Director is a subordinate official who has no power to take any further action with respect to these plaintiffs beyond what he has already done. His authority ceased with the issuance of the orders of supervision and the release of plaintiffs from custody on supervised parole. Nor is it claimed or alleged in any of the complaints that the [fols. 568-569] District Director has in any manner threatened to take further action against plaintiffs or any of them.

---

[4] *Massachusetts* v. *Missouri*, 308 U.S. 1, 17 (1939); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272 (1941).

Nowhere is it alleged that any of the plaintiffs has violated the terms of the statute under attack. A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine. Thus if they refuse to comply with the conditions of their parole, it is the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted. For aught that now appears there may be no actual prosecution of any of these plaintiffs, and the factual background indispensable to the determination of any such prosecution, should it take place, is in futuro and as yet non-existent.

The principle involved here is, in substance, the same as that reaffirmed by the Supreme Court in *United Public Workers of America (C. I. O.)* v. *Mitchell*, 330 U. S. 75 (1947). There, certain employees of the executive branch of the Federal Government and a union of such employees sued to enjoin the members of the Civil Service Commission from enforcing the provision of Section 9(a) of the Hatch Act which forbade such employees to take "any active part in political management or in political campaigns" and for a declaratory judgment holding the Act unconstitutional. In denying declaratory relief to all but one of the employees, on the ground that they had failed to present a justiciable controversy, the Court pointed out that these employees did not allege that they had violated the Act, or that the Commission had actually threatened to interfere with their rights, but only that they desired to engage in acts of political management and in political campaigns and understood that if they engaged in this activity the Commission would [fol. 570] order their dismissal from federal employment. A consideration of these factors compelled the Court to conclude that these employees "seem[ed] clearly to seek advisory opinions" as to whether or not they could "act contrary to the rule against political activity." As to these employees, the Court stated (pp. 89-90):

> "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual

cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. * * * [T]he facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justifiable case or controversy.

* * * * * * *

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The Court decided that one employee, Poole, was entitled to a declaratory judgment, as his suit presented a justiciable controversy. In so deciding, the Court pointed out that Poole admitted that he had violated the Act, that he had been charged by the Commission with political activity, and that a proposed order for his removal had been issued by the Commission subject to his right to reply to the charges and to present further evidence in refutation.

Here, the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for [fol. 571] reasonable debate, as defendant is not now nor will he ever be charged with the duty of enforcing this criminal statute.

Accordingly, the complaints are dismissed, plaintiffs' motions denied, and the temporary restraining orders vacated.

Dated: October 11th, 1954.

Harold M. Medina, United States Circuit Judge,
John F. X. McGohey, United States District Judge,
Edward Weinfeld, United States District Judge.

[fol. 572] [File endorsement omitted]

Civil 93-285, 93-286, 93-287, 93-288, 93-289, 93-290, 93-291, 93-292, 93-293, 93-294, 93-228

#59727

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUZMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of The Immigration and Naturalization Service of the Port of New York, Defendant

Civil 87-98, 87-99, 87-124

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of The Immigration and Naturalization Service of the Port of New York, Defendant

JUDGMENT—December 1, 1954

The plaintiffs having each filed a complaint against the defendant for judgment, pursuant to 5 U.S.C.A. § 1009 and 8 U.S.C.A. § 1329:(1) declaring that Section 242(d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252 (d)], the rules and regulations [8 C.F.R. § 242.3(c)] promulgated thereunder and the Orders of Supervision made and issued with respect to each of the plaintiffs are uncon- [fol. 573] stitutional, invalid, illegal, void and inoperative; (2) declaring that particular provisions of each of the said Orders of Supervision are unreasonable and an abuse of power; and (3) requesting that the defendant be enjoined from requiring the plaintiffs to comply with the conditions of their respective Orders of Supervision; and the plaintiffs Michael Nukk, Frank Borich, Joseph Simonoff, Felix Kuzman, Rose Lightcap, Ida Gottesman, Anna Taffler,

Benny Saltzman, Bessie Geiser and Martin Young each having moved by an order to show cause dated June 2, 1954; and the plaintiff Boris Sklar having moved by an order to show cause dated May 25, 1954; and the plaintiffs Betty Gannett and Alexander Bittleman each having moved by an order to show cause dated August 5, 1953; and the plaintiff Claudia Jones having moved by an order to show cause dated August 7, 1953, for temporary injunctions against the defendant pending the hearing and determination of the said actions and for temporary restraining orders pending the hearing and determination of the respective orders to show cause; and the Court having granted temporary restraining orders with respect to paragraphs 2 and 4 of the Orders of Supervision relating to the plaintiffs Nukk, Borich, Siminoff, Kuzman, Lightcap, Gottesman, Taffler, Saltzman, Geiser and Young; and with respect to all of the paragraphs of the Order of Supervision relating to the plaintiff Sklar; and with respect to paragraphs 2, 4, 5, 6 and 7 of the Orders of Supervision relating to plaintiffs Gannett, Bittleman and Jones; and the defendant having cross-moved with respect to all fourteen complaints for an order (1) dismissing all of the complaints herein, pursuant to Rule 12(b) of the Rules of Civil Pro-
[fol. 574] cedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving the temporary restraining orders; and (3) appointing a three-judge Court, in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, to hear and determine the matters herein in issue; and by orders dated June 21, 1954 and June 23, 1954 there having been designated a three-judge statutory Court pursuant to said sections, composed of the Hon. Harold M. Medina, a Judge of the United States Court of Appeals for the Second Circuit and the Hon. John F. X. McGohey and Hon. Edward Weinfeld, Judges of the United States District Court for the Southern District of New York; and the said motions having come on to be heard jointly before the said three-judge Court on June 30, 1954; and the Court having rendered a decision on October 11, 1954 ordering that the complaints herein be dismissed; that the plaintiffs' motions for tem-

porary injunctive relief be denied; and that the above-mentioned temporary restraining orders be vacated; now in accordance with said decision, it is,

ORDERED AND ADJUDGED that each of the above-entitled complaints be and they hereby are dismissed, that each of plaintiffs' aforesaid motions for temporary injunctions shall be and hereby are denied, and that each of the temporary restraining orders described hereinabove shall be and hereby are vacated, and it is.

FURTHER ORDERED AND ADJUDGED that the defendant in each of the aforesaid actions, Edward J. Shaughnessy, shall recover judgment against each of the plaintiffs for his costs and disbursements as taxed in the following amounts:

[fol. 575] *Action*	*Civil No.*	*Costs*
Nukk v. Shaughnessy	93-285	$20.00
Borich v. Shaughnessy	93-286	$20.00
Siminoff v. Shaughnessy	93-287	$20.00
Kuzman v. Shaughnessy	93-288	$20.00
Lightcap v. Shaughnessy	93-289	$20.00
Gottesman v. Shaughnessy	93-290	$20.00
Taffler v. Shaughnessy	93-291	$20.00
Saltzman v. Shaughnessy	93-292	$20.00
Geiser v. Shaughnessy	93-293	$20.00
Young v. Shaughnessy	93-294	$20.00
Sklar v. Shaughnessy	93-228	$20.00
Gannett v. Shaughnessy	87-98	$20.00
Bittleman v. Shaughnessy	87-99	$20.00
Jones v. Shaughnessy	87-124	$20.00

and that said defendant have execution for said costs and disbursements as taxed.

Dated: New York, N. Y., December 1, 1954.

Harold R. Medina, United States Circuit Judge,
John F. X. McGohey, United States District Judge,
Edward Weinfeld, United States District Judge.

Judgment entered:
Dec. 1, 1954.

William V. Connell, Clerk.

[fol. 575a] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285 B
Civ. No. 93-286 B
Civ. No. 93-287 B
Civ. No. 93-288 B
Civ. No. 93-289 B
Civ. No. 93-290 B
Civ. No. 93-291 B
Civ. No. 93-292 B
Civ. No. 93-293 B
Civ. No. 93-294 B
Civ. No. 93-228 B

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUZMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

Civ. No. 87-98 B File
Civ. No. 87-99 B
Civ. No. 87-124 B

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Dec. 7, 1954

I. Notice is hereby given that the plaintiffs above-named hereby appeal to the Supreme Court of the United States from the final order and judgment dismissing the com-

[fol. 576] plaints herein and denying the plaintiffs' motions for temporary injunctions, entered herein, respectively, on October 11, 1954 and December 1, 1954.

This appeal is taken pursuant to 28 U.S.C.A. §2101.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. In the action entitled *Michael Nukk* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-285):

(a) the complaint;
(b) the affidavit of Michael Nukk in support of the Order to Show Cause therein;
(c) the Order to Show Cause; therein;

2. In the action entitled *Frank Borich* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-286):

(a) the complaint;
(b) the affidavit of Frank Borich in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

3. In the action entitled *Joseph Simonoff* v. *Edward J. Shaughnessy, etc.* (Civ. 93-287):

(a) the complaint;
(b) the affidavit of Joseph Simonoff in support of the [fol. 577] Order to Show Cause therein;
(c) the Order to Show Cause.

4. In the action entitled *Felix Kuzman* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-288):

(a) the complaint;
(b) the affidavit of Felix Kuzman in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

5. In the action entitled *Rose Lightcap* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-289):

(a) the complaint;
(b) the affidavit of Rose Lightcap in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

6. In the action entitled *Ida Gottesman* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-290):

(a) the complaint;
(b) the affidavit of Ida Gottesman in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

7. In the action entitled *Anna Taffler* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-291):

(a) the complaint;
(b) the affidavit of Anna Taffler in support of the [fol. 578] Order to Show Cause therein;
(c) the Order to Show Cause.

8. In the action entitled *Benny Saltzman* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-292):

(a) the complaint;
(b) the affidavit of Benny Saltzman in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

9. In the action entitled *Bessie Geiser* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-293):

(a) the complaint;
(b) the affidavit of Bessie Geiser in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

10. In the action entitled *Martin Young* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-294):

(a) the complaint;
(b) the affidavit of Martin Young in support of the Order to Show Cause therein;

(c) the Order to Show Cause.

11. In the action entitled *Boris Sklar* v. *Edward J. Shaughnessy, etc.* (Civ. No. 93-228):

(a) the complaint;
(b) the affidavit of Boris Sklar in support of the [fol. 579] Order to Show Cause therein;
(c) the Order to Show Cause.

12. In the action entitled *Betty Gannett* v. *Edward J. Shaughnessy, etc.* (Civ. No. 87-98):

(a) the complaint;
(b) the affidavit of Betty Gannett in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

13. In the action entitled *Alexander Bittleman* v. *Edward J. Shaughnessy, etc.* (Civ. No. 87-99):

(a) the complaint;
(b) the affidavit of Alexander Bittleman in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

14. In the action entitled *Claudia Jones* v. *Edward J. Shaughnessy, etc.* (Civ. No. 87-124):

(a) the complaint;
(b) the affidavit of Claudia Jones in support of the Order to Show Cause therein;
(c) the Order to Show Cause.

15. Separate Notices of Motion, dated September 29, 1953, to dismiss the complaint and to vacate the temporary [fol. 580] restraining order, under the respective captions:

(a) *Gannett* v. *Shaughnessy;*
(b) *Bittleman* v. *Shaughnessy;*
(c) *Jones* v. *Shaughnessy.*

16. Affidavit of Lester Friedman, dated October 1, 1953, under the caption *Gannett (and two others)* v. *Shaughnessy,*

DARK PAGE BLE

in opposition to plaintiffs' motions for a temporary injunction and in support of defendant's motion to dismiss.

17. Notice of Motion, dated June 1, 1954, under the caption *Sklar* v. *Shaughnessy*, to dismiss the complaint, vacate the temporary restraining order, and appoint a three-judge court.

18. Notice of Motion, dated June 4, 1954, under the caption *Nukk (and nine others)* v. *Shaughnessy*, to dismiss the complaints, vacate the temporary restraining orders and appoint a three-judge court.

19. Affidavit of Blanch Freedman, dated June 8, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy*, in opposition to defendant's motion to vacate the temporary restraining orders.

20. Separate Notices of Motion, dated June 9, 1954, to dismiss the complaints, vacate the temporary restraining orders and appoint a three-judge court under the respective captions:

(a) *Gannett* v. *Shaughnessy;*
(b) *Bittleman* v. *Shaughnessy;*
(c) *Jones* v. *Shaughnessy.*

[fol. 581] 21. Order of Hon. Harrie B. Chase, Circuit Judge, dated June 21, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy* and *Gannett (and two others)* v. *Shaughnessy* designating a three-judge court.

22. Order of Hon. Edward J. Weinfeld, dated June 21, 1954, under the caption *Gannett (and two others)* v. *Shaughnessy*, directing a hearing by the three-judge court.

23. Order of Hon. John F. X. McGohey, dated June 23, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy*, directing a hearing by the three-judge court.

24. Notice, Dated June 23, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy*, and *Gannett (and two others)* v. *Shaughnessy*, of appointment of three-judge court and of the date of hearing.

25. Affidavit of Lester Friedman, dated June 30, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy*, and *Gannett (and two others)* v. *Shaughnessy*, to supplement the prior affidavit submitted in *Gannett (and two others)* v. *Shaughnessy.*

EED THRU

26. Order of Hon. John F. X. McGohey, dated July 27, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy,* modifying the temporary restraining orders.

27. Decision and order of the three-judge court dated October 11, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy* and *Gannett (and two others)* v. *Shaughnessy.*

[fol. 582] 28. Judgment of the three-judge Court, dated December 1, 1954, under the caption *Nukk (and ten others)* v. *Shaughnessy* and *Gannett (and two others)* v. *Shaughnessy.*

29. Notice of Appeal herein under the caption *Nukk (and ten others)* v. *Shaughnessy* and *Gannett (and two others)* v. *Shaughnessy.*

III. The following questions are presented by this appeal:

1. Whether the Court erred in its determination that there was no actual and existing controversy between the parties plaintiff and defendant.

(a) Whether an action under the Administrative Procedures Act, 5 U.S.C.A. § 1009, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, for judicial review of that order in the form of proceeding authorized by 5 U. S. C. A. § 1009(b), presents a case or controversy between the parties within the meaning of Article III, § 2 of the United States Constitution.

(b) Whether an action for declaratory judgment, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, presents a case or controversy between the parties within the meaning of Article III, § 2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(c) Whether, in the action set forth in (b) above, the party plaintiff is entitled to temporary of permanent auxiliary equitable relief from the order, where it is shown that compliance with the order has or will

DARK PAGE BL

deprive the plaintiff of liberty, property and civil rights and that violation of the order would subject the plaintiff to multiple criminal penalties.

[fol. 583] (d) Whether an action for injunction or mandamus, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, to relieve the plaintiff from the obligations imposed upon him by the order, presents a case or controversy between the parties within the meaning of Article III, § 2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(e) Whether, in the action set forth in (d) above, it is a proper exercise of the court's discretion to grant relief, once the order—creating obligations, compliance with which deprives the plaintiff of liberty, property and civil rights and violation of which subjects him to multiple criminal penalties—is issued, although no violation of its terms has been committed and no criminal prosecution has been specifically threatened or begun.

2. Whether Section 242 (d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252(d)], on its face and as applied herein, is unconstitutional, invalid and void, in that:

(a) Said section, on its face, deprives the plaintiffs of procedural due process of law in violation of the Fifth Amendment to the United States Constitution.

(b) Said section, as applied, is a bill of attainder and ex post facto law in violation of Article 1, § 9 of the United States Constitution.

(c) Said section, on its face and as applied, deprives the plaintiffs of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

(d) Said section, on its face and as applied, imposes punishment upon the plaintiffs in violation of the Fifth and Eighth Amendments to the United States Constitution.

E BLEED THRU

[fol. 584] (e) Said section, on its face and as applied, deprives the plaintiffs of the equal protection of the laws, in violation of the Fifth Amendment to the United States Constitution.

(f) Said section unlawfully delegates legislative power to the Attorney General of the United States, his representatives, agents and employees, in violation of Article I, § 1 of the United States Constitution.

(g) Said section is vague and indefinite, in violation of the Fifth Amendment to the United States Constitution.

(h) Sub-sections (1) and (2) of said section are vague and indefinite and deprive plaintiff of liberty without due process of law, all in violation of the Fifth Amendment to the United States Constitution.

(i) Sub-section (3) of said section is so vague and indefinite as to permit the abridgement of plaintiff's right of lawful speech, press, assembly and association, in violation of the first Amendment to the United States Constitution.

(j) Sub-section (4) of said sec-ion unlawfully delegates legislative power to the Attorney General of the United States, his representatives, agents and employees, in violation of Article I, § I of the United States Constitution.

3. Whether Rule 242.3(c) of the Immigration and Nationality Regulations [8 C.F.R. § 242.3(c)] is unconstitutional, void and illegal in that:

(a) Said rule unlawfully redelegates legislative power to the defendant, his representatives, agents and employees in violation of Article I, § 1 of the United States Constitution.

(b) Said section delegates rule-making power to the defendant, unwarranted by and in violation of the provisions of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. § 1252(d)].

[fol. 585] 4. Whether the "Orders of Supervision" issued to each of the plaintiffs herein allegedly under the authority of Section 242(d) of the Immigration and Nationality Act of

DARK PAGE BL

1952 [8 U. S. C. A. § 1252(d)] and Section 242.3(c) of the Immigration and Nationality Regulations [8 C. F. R. 242.3(c)] are unconstitutional, invalid and void in that:

(a) Said orders and certain sections thereof are unlawful exercise of legislative power by the Attorney General of the United States and the defendant herein in violation of Article I, § 1 of the United States Constitution.

(b) Said orders and certain sections thereof deprive the plaintiffs of liberty and property and impose punishment upon them without due process of law in violation of the Fifth and Eighth Amendments to the United States Constitution.

(c) Said orders and certain sections thereof deprive the plaintiffs of freedom of speech, press and association in violation of the First Amendment to the United States Constitution.

(d) Said orders and certain sections thereof are vague and indefinite in violation of the First and Fifth Amendments to the United States Constitution.

(e) Said orders and certain sections thereof are unauthorized by and in violation of Section 242(d) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. § 1252(d)].

(f) Said orders bear no reasonable relation to a lawful exercise of the power to deport or to the eventual deportation of the plaintiffs and are unreasonable, harsh, punitive and an abusive use of the defendant's power.

Dated: December 6, 1954

Blanch Freedman & Gloria Agrin, By Blanch Freedman, Attorneys for the Plaintiffs, Office & P. O. Address: 220 Broadway, Borough of Manhattan, New York 38, N. Y.

[fol. 586] Proof of Service

I, Blanch Freedman, one of the attorneys for the plaintiffs, appellants herein, and a member of the bar of the Su-

EED THRU

preme Court of the United States, hereby certify that, on the 7th day of December, 1954, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the defendant, appellee herein, as follows:

1. By leaving a copy thereof at the office of J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, at Room 311, Federal Courthouse, Foley Square, New York City, New York, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

Blanch Freedman, Attorney for Plaintiffs, Office & P. O. Address: 220 Broadway, New York, N. Y.

[fol. 587] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285
93-286
93-287
93-288
93-289
93-290
93-291
93-292
93-293
93-294
93-228

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUZMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Geiser, Martin Young, Boris Sklar, Plaintiffs

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

Civ. No. 87- 98
87- 99
87-124

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant.

ORDER DIRECTING SUBMISSION OF ORIGINAL PAPERS—Jan. 7, 1955

At New York, New York, in said District on the 7th day of January, 1955.

Upon the annexed affidavit of Blanch Freedman duly

sworn to on the 6th day of January, 1955, upon the notice of appeal dated December 7, 1954, served and filed herein by the plaintiffs-appellants above named and upon all the papers and proceeding had herein,

[fol. 588] Now, upon motion of Blanch Freedman & Gloria Agrin, attorneys for plaintiffs-appellants, it is hereby

ORDERED, that the Clerk of this Court is authorized and directed to transmit to the Clerk of the Supreme Court of the United States all the original papers filed in the office of the Clerk of this Court which are specified in the designation of the plaintiffs-appellants as contained in the notice of appeal dated and filed herein December 7, 1954, and it is further

ORDERED, that the said records be safely kept by the Clerk of the Supreme Court of the United States and that they be returned to the Clerk of this Court upon the conclusion of the appeal.

John F. X. McGohey, U.S.D.J.

DARK PAGE BL

[fol. 589] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285, 93-286, 93-287, 93-288, 93-289, 93-290, 93-291, 93-292, 93-293, 93-294, 93-228

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, Rose Lightcap, Ida Gottesman, Anna Taffler, Benny Saltzman, Bessie Beiser, Martin Young, Boris Sklar, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

Civ. No. 87-98, 87-99, 87-124

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York, Defendant

STATE OF NEW YORK,
County of New York, ss:

BLANCH FREEDMAN, being duly sworn, deposes and says:

She is a member of the firm of Blanch Freedman & Gloria Agrin, attorneys for the plaintiffs-appellants above named. She is fully cognizant of all the facts and pro-[fol. 590] ceedings heretofore had herein and submits this affidavit in support of the annexed order for the transmission of original papers to the Clerk of the Supreme Court of the United States.

The above enumerated fourteen suits were argued and determined jointly by a statutory three-judge court of this district.

On October 11, 1954, the said court rendered its opinion and decision dismissing the complaint; judgment thereon was made and entered herein on December 1, 1954.

A notice of appeal to the Supreme Court of the United

ED THRU

States was duly filed herein on December 7, 1954 in accordance with the revised rules of the said court. Since filing the said notice of appeal and designation, Mr. Justice Frankfurter, on plaintiffs-appellants' application for a stay pending appeal ruled on January 3, 1955 as follows:

> ". . . Having due regard to all the circumstances, including of course the restrictions on the free movement of these appellants, I do not think I would be warranted in exercising discretion to stay the action of appellee. However, since legal issues which do not appear to me to be frivolous call for adjudication, issues that concern restraints on liberty, I think appropriate steps should be taken whereby the case may reach our appellate docket for early argument. Unless obstacles of which I am not apprised are in the way, this appeal ought to be capable of being perfected here *by January 15, 1955*. The Government will not, I am confident, stand on its full time for making a response, and one may assume that the case will be ripe for consideration by the Conference to be held on [fol. 591] January 29, 1955. If this schedule is realized and the appeals are then set for argment, the case can be heard at the session of the Court beginning on February 28, 1955.
>
> In the light of these considerations the application for a stay pending appeal is denied." [underscoring added].

The transcript of record designated for transmission herein is necessarily voluminous because it concerns the pleadings, motion papers, affidavits and orders in fourteen actions. The precise papers are listed on pages 2 to 8 of the notice of appeal, a copy of which will be exhibited herein.

The retyping of all of these documents would be a tremendously inordinate undertaking. Indeed, deponent respectfully submits, that it would be physically impossible to perform this task within the scheduled time. Moreover, the cost therefor would be prohibitive to appellants herein.

As indicated by Mr. Justice Frankfurter, the issues

herein are not frivolous; they involve serious constitutional questions of restraints on liberty.

The Supreme Court Rules (Rule 12) allows the transmission of original records. The attorneys for appellants will cooperate and assist in every way possible in the assembling of the designated papers which they seek to have filed with the Clerk of the Supreme Court of the United States.

No previous application for the relief herein requested has heretofore been made.

Blanch Freedman.

Sworn to before me this Sixth day of January, 1955. Irving Felcher, Notary Public, State of New York, No. 24-6258400. Qualified in Kings County. Certified with Kings & N. Y. Co. Clks. & Regs. Commission Expires March 30, 1956.

[fol. 592] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 549

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF ET. AL., Appellants,

vs.

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service, etc.

ORDER NOTING PROBABLE JURISDICTION—January 31, 1955

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 31, 1955.

(1207-0)

Office - Supreme Court,
JAN 15 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 549 '29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 15

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Plaintiffs-Appellants,
220 Broadway,
New York City.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050 110

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	6
REASONS FOR PLENARY CONSIDERATION OF THE QUESTIONS PRESENTED	10
A. THE THRESHOLD QUESTION	11
B. THE MERITS OF THE CASE	20
I. Section 1252(d), on its face, deprives appellants of procedural due process in violation of the Fifth Amendment and, as applied, violates Article 1, Section 9 of the United States Constitution	20
(a) Section 1252(d), on its face, violates the due process clause of the Fifth Amendment	20
(b) Section 1252(d), as applied, is a bill of attainder and ex post facto law	22
II. Section 1252(d), on its face and as applied, deprives appellants of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution	25
III. Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth and Eighth Amendments to the United States Constitution	32
(a) Section 1252(d) inflicts punishment without due process of law in violation of the Fifth Amendment	32

PAGE

(b) Section 1252(d) inflicts cruel and unusual punishment in violation of the Eighth Amendment 36

IV. Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution 38

V. Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution 41

(a) Section 1252(d) is an unlawful delegation of power 41

(b) 8 C. F. R. §242.3(c) is an unlawful redelegation of legislative power 44

(c) The supervisory conditions imposed here are a usurpation of a legislative power . 45

VI. Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States 48

(a) As to Subsection (4) 48

(b) As to Subsection (3) 52

(c) As to Subsections (1) and (2) 53

VII. The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power 54

CONCLUSION 54

APPENDIX:

Opinion of Statutory Court 1a

DARK PA

Cases Cited

PAGE

Allgeyer v. Louisiana, 165 U. S. 578 (1897) 29, 52

Alvater v. Freeman, 319 U. S. 359 (1943) 18fn

American Communications Association v. Douds, 339 U. S. 382 (1950) 1, 49

American Power & Light Co. v. Securities & Exch. Comm'n, 329 U. S. 90 (1946) 41

Bauer v. Acheson, 106 F. S. 445 (D. C. D. C. 1952) 29, 30, 52

Bolling v. Sharpe, 347 U. S. 497 (1954) 29

Boyd v. United States, 116 U. S. 616 (1886) 53

Bridges v. Wixon, 326 U. S. 135 (1945) 25, 48

Brooks, Petition of, 5 F. 2d 238 (D. C. D. Mass., 1925) 26, 27, 29, 30

Burgess v. Salmon, 97 U. S. 381 (1878) 32

Carleton Screw Products Co. v. Fleming, 126 F. 2d 537 (C. C. A. 8th, 1942), cert. den. 317 U. S. 634 39

Carlson v. Landon, 342 U. S. 524 (1952) 23, 26, 31, 33, 39, 42, 45

Chew v. Colding, 344 U. S. 590 (1953) 10, 25, 48

City Bank v. Schnader, 291 U. S. 24 (1934) 19fn

Coffman v. Breeze Corporations, 323 U. S. 316 (1945) 1

Columbia Broadcasting System v. United States, 316 U. S. 407 (1942) 15, 16, 17, 18

Connally v. General Const. Co., 269 U. S. 385 (1926) . 49

Connecticut Mutual Life Ins. Co. v. Moore, 333 U. S. 541 (1948) 17fn, 18fn

PAGE BLEED THRU

PAGE

Cummings v. Missouri, 71 U. S. 277 (1866) 32, 33, 35

Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207 (1903) 19fn

Detroit Bank v. United States, 317 U. S. 329 (1943) ..38, 39

Dobbins v. Los Angeles, 195 U. S. 223 (1904) 19fn

Eccles v. Peoples' Bank of Lakewood Village, 333 U. S. 426 (1948) 13fn

Federal Power Commission v. Pacific Power & Light Co., 307 U. S. 156 (1939) 13fn, 14fn

Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1930) 13fn, 14fn

Federal Radio Comm'n v. Nelson Bros. Co., 289 U. S. 266 (1933) 13fn

Fong Yue Ting v. United States, 149 U. S. 698 (1893) 13fn

Galvan v. Press, 347 U. S. 522 (1954) 24

Garland, Ex parte, 71 U. S. 333 (1866) 32

Gibbs v. Buck, 307 U. S. 66 (1939) 19fn

Gunter v. Atlantic Coast Line, 200 U. S. 273 (1906) .. 11

Harisiades v. Shaughnessy, 342 U. S. 580 (1952) ...24, 32

Herndon v. Lowery, 301 U. S. 242 (1937) 48

Hill v. Florida, 325 U. S. 538 (1945) 18fn

Hines v. Davidowitz, 312 U. S. 52 (1941) 35

Hirabayashi v. United States, 320 U. S. 81 (1943) ... 39

Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925) 19fn

Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894) 14fn

DARK PA

PAGE

Jamison v. Texas, 318 U. S. 413 (1943) 34, 49

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951) 50, 51

La Crosse Telephone Corp. v. Wisconsin, Emp. Bd., 336 U. S. 18 (1949) 13fn, 15fn

Lanzetta v. New Jersey, 306 U. S. 451 (1939) 49

Lichter v. United States, 334 U. S. 742 (1948) 41

Louisiana v. Resweber, 329 U. S. 459 (1947) 36

Mahler v. Eby, 264 U. S. 32 (1924) 23

Musser v. Utah, 333 U. S. 95 (1948) 49

Near v. Minnesota, 283 U. S. 697 (1931) 49

Old Colony Trust Co. v. Comm'r of Int. Rev., 279 U. S. 716 (1929) 13, 13fn

Panama Refining Co. v. Ryan, 293 U. S. 388 (1935) .. 41

Pfeiffer Brewing Co. v. Bowles, 146 F. 2d 1006 (Em. Ct. App., 1945), cert. den. 324 U. S. 865 39

Philadelphia Co. v. Stimson, 223 U. S. 605 (1912) ... 18fn

Pierce v. Carskadon, 83 U. S. 234 (1872) 32

Pierce v. Society of Sisters, 268 U. S. 510 (1925) 19fn

Powell v. United States, 300 U. S. 276 (1937) 15fn

Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908) .. 16fn

Public Service Comm'n v. Wycoff Co., 344 U. S. 237 (1952) 17fn, 18

Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939) 13fn, 14fn, 15, 15fn, 16, 18fn

Rogers v. United States, 340 U. S. 367 (1951) 34, 49

Saksagansky v. Weedin, 53 F. 2d 13 (C. C. A. 9th, 1931) 27

PAGE BLEED THRU

PAGE

Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935) 41

Schenley Distillers Corp. v. United States, 326 U. S. 432 (1946) 16

Schoeps v. Carmichael, 177 F. 2d 391 (C. A. 9th, 1949), cert. den. 339 U. S. 914 53

Shaughnessy v. United States ex rel. Mezei, 345 U. S. 206 (1953) 26fn

Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177 (1938) 16, 18fn

Smith v. United States, 337 U. S. 137 (1949) 53

Stark v. Wickard, 321 U. S. 288 (1944) 17fn

State of Oklahoma v. United States Civil Service Commission, 330 U. S. 127 (1947) 10, 12, 13fn, 14

Steuart & Bro. v. Bowles, 322 U. S. 398 (1944) 47

Stromberg v. California, 283 U. S. 359 (1931) 48

Takahashi v. Fish Comm'n, 334 U. S. 410 (1948) ..31, 38, 52

Terrace v. Thompson, 263 U. S. 197 (1923) 19fn

Thomas v. Collins, 323 U. S. 516 (1945) 49

United Public Workers v. Mitchell, 330 U. S. 75 (1947) 12

United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940) 18fn

United States v. Cardiff, 344 U. S. 174 (1952) 51

United States v. Carolina Products Corp., 315 U. S. 475 (1942) 45

United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 49

United States v. Dennis, 183 F. 2d 201 (C. A. 2d, 1950) 34

United States v. Lovett, 328 U. S. 303 (1946) 24

DARK PAG

PAGE

United States v. 11,150 Pounds of Butter, 195 F. 657 (C. C. A. 8th, 1912) 45

United States v. Los Angeles R. R., 273 U. S. 299 (1927) 13fn

United States v. Ragen, 54 F. Supp. 973 (D. C. N. D. Ill. E. D., 1944), aff'd 146 F. 2d 349, cert. den. 325 U. S. 865 37

United States v. Spector, 343 U. S. 169 (1952) 20, 21, 22, 25

United States ex rel. Blankenstein v. Shaughnessy, 117 F. S. 699 (D. C. S. D. N. Y., 1953) 27

United States ex rel. Dzuro v. District Director, 102 F. S. 704 (D. C. S. D. N. Y., 1951) 27

United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537 (1950) 41

United States ex rel. Kusman v. Shaughnessy, 117 F. S. 541 (D. C. S. D. N. Y., 1953) 27

United States ex rel. Mezei v. Shaughnessy, 195 F. 2d 964 (C. A. 2d, 1952) 26, 27, 32, 33, 40, 53

United States ex rel. Ross v. Wallis, 279 F. 401 (C. C. A. 2d, 1922) 26, 27

Walker v. Chief Quarantine Officer, 69 F. S. 980 (D. C. D. Canal Zone Div., 1943) 30

Weems v. United States, 217 U. S. 349 (1910) 36, 37

Williams v. Fears, 179 U. S. 270 (1900) 29, 30, 52

Winters v. New York, 333 U. S. 507 (1948) 48, 53

Wong Wing v. United States, 163 U. S. 228 (1896) 21, 26, 28, 31, 33, 39, 40

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 38

Young, Ex parte, 209 U. S. 123 (1908) 19fn

PAGE BLEED THRU

United States Constitution Cited

PAGE

Article I, §1 ..... 41, 46, 47

Article I, §9 ..... 20, 23

Article III, §2 ..... 3, 4

First Amendment 5, 48

Fifth Amendment 5, 19, 25, 28, 32, 38, 41, 48, 53

Eighth Amendment 38

Statutes Cited

5 U. S. C. A. 1009 ..... 1, 3, 6, 11

5 U. S. C. A. 1009(a) 8

5 U. S. C. A. 1009(b) 3, 8

8 U. S. C. A. 137 ..... 23, 24

8 U. S. C. A. 156(c) 20

8 U. S. C. A. 1251 ..... 23, 24, 40

8 U. S. C. A. 1252(d) [Immig. and Nat. Act of 1952, Sec. 242(d); 66 Stat. 163] 1, 3, 4, 5, 6, 8, 10, 14, 20, 21, 25, 27, 28, 31-42, 44, 46, 47, 48, 52, 53, 54

8 U. S. C. A. 1252(e) 20

8 U. S. C. A. 1302 35

18 U. S. C. A. 2385 ..... 40, 46

28 U. S. C. A. 1253 1

28 U .S. C. A. 2101 1

28 U. S. C. A. 2282 ..... 1, 9

28 U. S. C. A. 2284 ..... 1, 9

28 U. S. C. A. 2284 (3) 9

50 U. S. C. A. 783(f) 34, 40, 45, 49

DARK PAGE

Regulation Cited

PAGE

8 C. F. R. §242.3(c) 2, 5, 6, 8, 44

Rules Cited

COURT RULES:

R.R. 15(a) and (b) 1

R.R. 18 9

R.R. 50 9

R.R. 51 9

F. R. CIV. PROC.:

Rule 12(b) 8

Rule 65(b) 9

Texts Cited

Borchard, Challenging "Penal" Statutes, 52 Yale L. J. 445 (1943) 17fn

3 Elliott's Debates 447 36

25 N. C. L. Rev. 486, 487 (1947) 18fn

2 Story, Commentaries on the Constitution (5th Ed., 1891), Sec. 1903 36

Whalen, Punishment for Crime: The Supreme Court and the Constitution, 35 Minn. L. Rev. 109 (1951) .. 36

AGE BLEED THRU

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 15

Opinion Below

The court below was a three-judge court, appointed pursuant to 28 U. S. C. A. §§2282 and 2284, sitting in and for the Southern District of New York. It rendered a single opinion for all of the above-captioned actions. This opinion is reported in 125 F. Supp. 498 and is appended hereto as required by Rule 15(a) and (h) of the Revised Rules of this Court.

Jurisdiction

(i) The actions herein were instituted for judicial review of a final agency action, pursuant to 5 U. S. C. A. §1009, in forms of proceeding authorized by 5 U. S. C. A. §1009 (b). This appeal is from an order and judgment dismissing the complaints and denying motions for injunctions *pendente lite.*

(ii) The opinion and order of the court below was rendered and entered on October 11, 1954 and a judgment thereon made and entered on December 1, 1954. The notice of appeal herein was filed on December 7, 1954 in the United States District Court for the Southern District of New York.

(iii) Jurisdiction of the appeal herein is conferred upon this Court by 28 U. S. C. A. §§2101 and 1253.

(iv) The following cases are believed to sustain the jurisdiction of this Court: *American Communications Association* v. *Douds,* 339 U. S. 382 (1950); *Coffman* v. *Breeze Corporations,* 323 U. S. 316 (1945).

(v) The statute of the United States whose validity is involved is 8 U. S. C. A. §1252(d) [Section 242(d) of the Immigration and Nationality Act of 1952; 66 Stat. 163]. The text of this section is as follows:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six

months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or wilfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

The administrative regulation promulgated pursuant to authority purportedly granted by the statute and whose validity is challenged is 8 C. F. R. §242.3(c) [Section 242.3 (c) of the Immigration and Nationality Regulations]. The text of this regulation is as follows:

"An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of

DARK PAGE

such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of Section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification.

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

Questions Presented

(1) Whether an action under the Administrative Procedure Act, 5 U. S. C. A. §1009, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, for judicial review of that order in the form of proceeding authorized by 5 U. S. C. A. §1009(b), presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution.

(2) Whether an action for declaratory judgment, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, presents a case or con-

GE BLEED THRU

troversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(3) Whether, in the action set forth in (2) above, the party plaintiff is entitled to temporary or permanent auxiliary equitable relief from the order, where it is shown that compliance with the order has or will deprive the plaintiff of liberty, property and civil rights and that violation of the order would subject the plaintiff to multiple criminal penalties.

(4) Whether an action for injunction or mandamus, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, to relieve the plaintiff from the obligations imposed upon him by the order, presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(5) Whether, in the action set forth in (4) above, it is a proper exercise of the court's discretion to grant relief, once the order—creating obligations, compliance with which deprives the plaintiff of liberty, property and civil rights and violation of which subjects him to multiple criminal penalties—is issued, although no violation of its terms has been committed and no criminal prosecution has been specifically threatened or begun.

(6) Whether 8 U. S. C. A. §1252(d), which attaches criminal consequences to an administratively found order of deportation and does not permit independent judicial inquiry into its validity, on its face, infringes upon procedural due process of law guaranteed by the Fifth Amendment, and, as applied to the deportation orders against

DARK PAGE

the appellants which are based upon a finding of past membership in the Communist Party *eo nomine*, is a bill of attainder and *ex post facto* law.

(7) Whether 8 U. S. C. A. §1252(d), on its face, unlawfully delegates legislative power to the Attorney General, and, as applied, constitutes an unlawful re-delegation and usurpation by him of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(8) Whether 8 U. S. C. A. §1252(d), on its face and as applied, is so vague and indefinite as to encompass within its terms, constitutionally protected conduct and activity in violation of the First and Fifth Amendments and as to give inadequate notice of the crime created by it in violation of the Fifth Amendment to the United States Constitution.

(9) Whether an alien, against whom a final administrative order of deportation has been outstanding for more than six months and whose deportation cannot be effected, subjected to "supervision" within the meaning of 8 U. S. C. A. §1252(d) and 8 C. F. R. 242.3(c) on their face and as applied, is thereby deprived of liberty and property without due process of law in violation of the Fifth Amendment, subjected to punishment in violation of the Fifth and Eighth Amendments, deprived of equal protection of the law in violation of the Fifth Amendment, and deprived of rights of free speech and association in violation of the First and Fifth Amendments to the United States Constitution.

(10) Whether the orders issued to the appellants, which establish conditions of "supervision", pursuant to 8 U. S. C. A. §1252(d) and 8 C. F. R. 242.3(c) are, on their face and as applied, unreasonable and an abuse of power, in violation of 8 U. S. C. A. §1252(d) and the Fifth Amendment to the United States Constitution.

AGE BLEED THRU

Statement of the Case

The actions herein were brought by each of the appellants, under the Administrative Procedure Act, §1009 of Title 5 U. S. C. A., to review orders of Edward J. Shaughnessy, the District Director of the Third District of the Immigration and Naturalization Service, to wit: "Orders of Supervision" issued by him to each of the appellants pursuant to the authority purportedly vested in him by 8 U. S. C. A. §1252(d) and the regulations promulgated thereunder by the Attorney General: 8 C. F. R. §242.3(c).

Each of the appellants is the subject of a deportation proceeding, and against each of them there has been entered a final administrative order of deportation. These orders were based on an administrative finding, in each instance, that, after entering the United States, each of the appellants had been a member of the Communist Party of the United States. In each case, more than six months is elapsed since the entry of the deportation order.

Where more than six months elapse after the entry of a final administrative order of deportation against an alien, the provisions of 8 U. S. C. A. §1252(d) and 8 C. F. R. §242.3(c) require that the alien be placed under "supervision" as defined by their provisions. Under the alleged authority of the statute and regulations, the appellee made and issued an "Order of Supervision" against each of the appellants. These "Orders of Supervision" imposed regulations of and restrictions upon the conduct and activities of each of the appellants substantially as follows:[1]

> "That said alien shall upon request produce himself at a time and place designated for the purpose of sub-

1. The court below recognized that: "The orders of supervision vary in certain unimportant respects, e.g., in the numbering of regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted." [125 F. Supp. at 500, ftn. 3.]

DARK PAC

mitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

"That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

"That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

"That said alien shall report in [PERSON] on [day varies] of each week between 8:45 A.M. and 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

"That said alien shall terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.

"That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph 6.

"That said alien shall not violate Section 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

PAGE BLEED THRU

The actions herein were commenced following the issuance of these orders. The appellants, in effect, demanded "judicial review" of the "Orders of Supervision", within the purview of 5 U. S. C. A. §1009(a), as "persons suffering legal wrong because of an agency action [and] adversely affected [and] aggrieved by such action." The complaints were bottomed upon the charge (1) that 8 U. S. C. A. §1252(d); 8 C. F. R. §242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon the conduct and activities of the appellants incorporated therein, are unconstitutional, invalid, illegal, void and inoperative; and (2) that the regulations of and restrictions upon the conduct and activities of the appellants, incorporated in the "Orders of Supervision", are unreasonable and an abuse of power.

The "forms of proceeding for judicial review" elected by the appellants, under the prescriptions of 5 U. S. C. A. §1009(b) were actions for: (1) a judgment declaring unconstitutional, invalid, illegal, void and inoperative: 8 U. S. C. A. §1252(d); 8 C. F. R. 242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon their conduct and activities incorporated in the "Orders of Supervision"; and (2) as auxiliary relief, an order that the appellee (a) be directed to set aside and cancel the "Orders of Supervision"; and (b) be enjoined and restrained from requiring the appellants (i) to submit to supervision as required by the "Orders of Supervision"; or (ii) to comply with the regulations of or restrictions upon their conduct and activities, incorporated in the "Orders of Supervision". By orders to show cause, the appellants moved for equitable relief *pendente lite*.

The appellee cross-moved with respect to all fourteen complaints for an order: (1) dismissing the complaints, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable

DARK PAGE

party; (2) vacating and dissolving extant temporary restraining orders, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and 28 U. S. C. A. §2284(3); and (3) appointing a three-judge court, in accordance with the provisions of 28 U. S. C. A. §§2282 and 2284, to hear and determine the matters in issue.

The appellee's application for the appointment of a three-judge court, unopposed by the appellants, was granted by orders dated June 21, 1954 and June 23, 1954. The case came on to be heard June 30, 1954 before Hon. HAROLD J. MEDINA, United States Circuit Judge, and Hon. JOHN F. X. MCGOHEY and Hon. EDWARD WEINFELD, United States District Judges. On October 11, 1954, this court ordered that the complaints be dismissed for want of a justiciable controversy, the motions of the appellants for injunctions *pendente lite* denied, and the temporary restraining orders vacated. A judgment to this effect was made and entered on December 1, 1954.

A motion for a stay of the enforcement of the "Orders of Supervision" pending appeal to this Court was made to the court below and denied on December 17, 1954. A similar motion was made thereafter to Mr. Justice FRANKFURTER, pursuant to Rules 51, 50 and 18 of the Revised Rules of this Court. On January 3, 1955, he rendered a decision denying the stay requested. He concluded, however, that the appeal presented "legal questions which do not appear * * * to be frivolous [and which] will call for adjudication, issues that concern restraints on liberty." To assure that "the case reach [the] appellate docket for early argument", he suggested a schedule designed to bring the case before the January 29, 1955 conference of this Court and, "if set for argument," for hearing "at the session of the Court beginning February 28, 1955". The timetable he recommended was the perfection of this appeal by the appellants by January 15, 1955 and a commensurate relinquishment by the Government of its time to respond.

AGE BLEED THRU

Reasons for Plenary Consideration of the Questions Presented

Every aspect of this appeal presents for decision questions of law not heretofore decided by this Court. It is the first to challenge in this Court the validity of Section 1252(d) of Title 8 U. S. C. A. and its application. It is also the first which calls upon the Court to adjudicate the scope of the special remedy against invalid agency action created by sections of the Administrative Procedure Act. [*See*: FRANKFURTER, *J.*, concurring in *State of Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127, 147 (1947)]. The necessity for the resolution of these questions arises not only from the effect upon these appellants of the lower court's construction and application of the statutes involved. It stems also from the necessary impact of those laws and that decision upon many thousands of others and upon a whole system of law, long acknowledged to govern the rights not only of aliens, but of citizens as well. The challenged statute ordains and establishes an administrative tyranny over the lives of aliens to whom this nation of immigrants has historically afforded, as a matter of right, the protections of its first bulwark against tyranny: the United States Constitution. [*See e.g.*: *Chew* v. *Colding*, 344 U. S. 590 (1953)]. The decision of the court below, whose construction of the remedial statute forestalled a judicial examination of the substantive law and its application, creates a general legal impediment to recourse against administrative encroachment upon the rights of citizen and alien alike. The far-reaching implications which inhere in the aspect of the case which the lower court did decide as well as in the phase that it did not decide imperatively call for consideration of this appeal by the Court.

DARK PAGE

A.

The Threshold Question

The determination of the court below was made without reaching the merits of the controversy. It turned merely upon the resolution of a threshold jurisdictional question. The gravamen of its decision appears to be that:

> "The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate; and it has long been settled law that the constitutional powers of the courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do."

As this Court stated in *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291 (1906): "The soundness of the doctrine relied upon is undoubted. * * * The difficulty is that the doctrine is inapplicable to this case. * * * "

Section 1009 of Title 5, U. S. C. A., a section of the Administrative Procedure Act, authorizes judicial review of the rectitude of administrative orders by persons "aggrieved" by them. It is this remedy that the appellants sought. The decision of the court below reveals an unawareness that this was the relief requested. The premises upon which its conclusion is founded that it is "to clear for reasonable debate" that there is a "lack of any actual and existing controversy between the parties plaintiff and defendant" demonstrate the court's erroneous conception of the instant actions as devices to relieve the appellants, either by way of declaratory judgment or injunctive orders, from criminal prosecution. The decision below rested

GE BLEED THRU

upon *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947)—inapt in any event—an action for simple declaratory judgment and injunctive relief, thus re-inforcing the impression that the court below neglected to adjudicate the right of the appellants to the specific remedy for which they brought suit. Mr. Justice FRANKFURTER, concurring in *State of Oklahoma* v. *United States Civil Service Commission, supra* at 147, recognized the special character of the relief authorized by the review provisions of the Administrative Procedure Act and the need for their independent judicial interpretation.

> "The Administrative Procedure Act does not apply to the present case. * * * The Act will, in due course, present problems for adjudication. We ought not to anticipate them when, being irrelevant, they are not before us. The Act ought not to be used even for illustrative purpose because illustrations depend on construction of the Act. * * * "

The disposition of the court below to treat the appellants' demand for relief as so much surplusage, not only conflicts with such a view of the Administrative Procedure Act, but, in effect, repudiates its very existence. The empiric fact of its inscription on the statute books, however, is plain. The pattern for the construction of the section invoked by the appellants has been evolved by this Court in decisions construing analogous laws. Application to this case of the rationale which guided this Court's prior determinations should inexorably have produced a result diametrically contrary to the determination made by the lower court.

The majority of this Court in the *Oklahoma* case, which was instituted under the review provisions of the Hatch Act, was based upon an underlying thesis appropriate to the pertinent provisions of the Administrative Procedure Act. It stated:

DARK PAGE

"Congress has power to fix conditions for review of administrative orders. By providing for judicial review of the orders * * * Congress [made them] * * * a matter of judicial cognizance. * * * *" [at 137].

This expression is consonant with innumerable decisions of the Court, long acknowledged as the settled law. It has been held that where an administrative order is final,[2] and where the order commands the individual "to do or to refrain from doing anything,"[3] and where legal consequences may flow from the order,[4] the demand for judicial review presents, in the constitutional sense, a "case" or "controversy" between the parties.[5]

The controversy is said to relate to whether or not the administrator may, with legal impunity, require the subject of his order "to do or refrain from doing" those things specified in the order. The adverse parties are considered to be the administrator, insisting on his right, and the subject, resisting the demand as impermissible in law. In *Old Colony Trust Co.* v. *Commissioner of Int. Rev.*, *supra* at 724, the Court held:

"In the case we have here, there are adverse parties. The United States or its authorized official asserts its

2. *La Crosse Telephone Corp.* v. *Wisconsin Emp. Bd.*, 336 U. S. 18 (1949); *Eccles* v. *Peoples' Bank of Lakewood Village*, 333 U. S. 426 (1948); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).
3. *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-10 (1927).
4. *Rochester Telephone Corp.* v. *United States*, *supra*, at 132-33.
5. *La Crosse Telephone Corp.* v. *United States*, *supra*; *State of Oklahoma* v. *United States Civil Service Comm'n*, *supra*; *Rochester Telephone Corp.* v. *United States*, *supra*; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156 (1939); *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933); *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930); *Old Colony Trust Co.* v. *Comm'r of Int. Rev.*, 279 U. S. 716 (1929); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893).

AGE BLEED THRU

> right to the payment by a taxpayer of a tax * * * and the taxpayer is resisting that payment. * * * That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. * * * "[6]

In the instant cases, clearly, the "Orders of Supervision" are final, as the lower court itself recognized when it stated that the appellee "has no power to take any further action beyond what he has already done." Each "Order of Supervision" establishes a series of specific things that the appellants must do or refrain from doing. That legal consequences flow from the "Orders of Supervision" is evident under the challenged statute and it is recognized in the statement of the court below to the effect that: "A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine." The appellee asserts his right to promulgate and issue the "Orders of Supervision" and the appellants controvert the existence of such a right.

The court below misplaced its reliance on the *Mitchell* case, in which no specific order had been directed against the individual complainants. In the instant actions, as in the *Oklahoma* case, the action of the administrator had ripened into a final administrative order, embodying specific directives, against the appellants. Controversy over such an order, in the analogous review proceedings of the *Oklahoma* case, was held to be justiciable by this Court.

That the "Orders of Supervision" are reviewable orders, the legal validity of which are in controversy, in the constitutional sense, between the appellants and the appellee, appears to be beyond doubt under the applicable

6. *Accord*: *Rochester Telephone Corp.* v. *United States, supra; Federal Power Commission* v. *Pacific Power & Light Co., supra; Federal Radio Commission* v. *General Electric Co., supra; Cf. Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894).

DARK PAGE

authorities. The court below reasoned to a contrary conclusion from circumstances which this Court has held not to defeat judicial review.

The court below ruled that no present controversy exists because the "Orders of Supervision" in and of themselves do not inflict penalties for violation, but that the exaction of penalties depends on measures other than the issuance of the orders by the appellee. That governmental action over and beyond the issuance of the "Orders of Supervision" is needed to effect sanctions for disobedience, does not detract from the present reviewability of the "Orders of Supervision". In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 417-18 (1942), the Court held:

> "The regulations are not less reviewable because their promulgation did not operate of their own force to deny or cancel a license. * * * Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. * * * Such regulations have the force of law before their sanctions are invoked as well as after. * * * When * * * they are promulgated by order * * * they are appropriately the subject of attack. * * * "[7]

The court below ruled that the controversy cannot exist between the appellants and the appellee because, upon violation of the "Orders of Supervision", it would not be the appellee but "the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted." Yet, in *Rochester Telephone Corp.* v. *United States, supra* at 136,

7. *Accord*: *La Crosse Telephone Corp.* v. *United States, supra*; *Rochester Telephone Corp.* v. *United States, supra*; *Powell* v. *United States*, 300 U. S. 276 (1937).

AGE BLEED THRU

the Court, discussing one of its prior opinions as having "partly yielded to the Government's main contention that the [review] statute applied only where the order [of the Commission] complained of was one which was to be enforced by the Commission," held:

> "More recent decisions of the Court, however, have dispensed with this requisite for review. • • • "

The rationale of this Court would seem to be that although the order is made by the administrator, "not for further proceedings by [himself], it is nonetheless a part of a regulatory scheme. • • • " *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 182 (1938). A court's mandate, under these circumstances, is considered an adequate conclusion of the controversy, for "while penalties may be imposed by the statute for its violation and not for disobedience of the [administrative] order, a favorable order [by the court] would render the prohibitions of the statute inoperative. • • • " *Rochester Telephone Corp.* v. *United States, supra* at 132-33. Any other construction of [a review statute] would make it necessary for a [person] to take the risk of [acting] illegally and incurring criminal penalties in order to secure a determination [of his rights]." *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 436 (1946). The existence of an order fixing the responsibilities of its subject, is not an abstract declaration by an administrator, but "necessarily and immediately carries direction of obedience." *See*: *Rochester Telephone Corp.* v. *United States, supra* at 143-44. A complainant need neither violate the order,[8] as the court below suggests, or establish with certainty, as it further insists, that proceedings will be begun to enforce the penalty incurred for non-compliance. *Columbia Broadcasting System* v. *United States, supra* at 418-20. "The purposes sought to be accomplished

8. *See*: *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210 (1908).

DARK PAGE

by [a review statute] would be defeated if a suitor were unable to resort to them to avoid * * * injury resulting from * * * the legal consequences of the [administrative] order * * * *" *Columbia Broadcasting System* v. *United States, supra* at 419.

It is quite clear, therefore, that the decision of the lower court was in error in avoiding a necessary determination under the applicable law and in accepting, as its theses, premises tending to emasculate remedies available for relief from oppressive administrative action.

The decision of the court below would be in error even were the appellants not relying on the remedy accorded them by the Administrative Procedure Act. Administrative action has long been subject to challenge in ordinary injunction[9] and declaratory judgment[10] actions. The lower court's discomfort concerning the adversary character of the relationship between the appellants and the appellee, seems to stem from the fact that disobedience of the orders of the appellee incurs a penalty not to be affected by him. That this fact should have moved the court below to its conclusion that the parties are not adversaries would seem evidence of an infirmity which Professor Edwin Borchard considers general "in the field of statutes regulating commercial or civil life." He states: "* * * the appendage of a penalty to the regulation ["the least important element of the regulation"] seems to anesthetize the imagination and power of analysis."[11]

The approach of the court below is what has been termed "the unrealistic attitude that a person whose activities are

9. *Stark* v. *Wickard*, 321 U. S. 288 (1944).
10. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952); *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541 (1948).
11. *Borchard, Challenging "Penal" Statutes*, 52 Yale L. J. 445, 475 (1943).

AGE BLEED THRU

within the purview of the statute can only be affected thereby when its sanctions are enforced against him."[12] This Court has rejected the idea that the issuance of the administrative order, separately enforceable, cannot presently injure the party subject to it in light of his present freedom to obey it or not. "They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. • • • " *Columbia Broadcasting System* v. *United States*, *supra* at 419. The administrator is considered "part of the regulatory scheme,"[13] and a judgment adverse to his action will have effect in that it "will render the [penal] provisions of the statute inoperative."[14] It is clear that even under circumstances where the administrator is not to impose the penalties for violation of his order, he is, nonetheless, an adverse party, and a proper defendant. This Court has accepted him as such both in declaratory judgment[15] and injunction actions.[16]

Certainly violation of the order is no precondition to justiciability in a declaratory judgment action, whose function it is to avoid "any risk of suffering penalty, liability or prosecution." *Public Service Commission* v. *Wycoff Co.*, *supra* at 245-46.[17] Nor is it a prerequisite to injunctive relief.[18] Even were the effect of the injunctive relief to be deemed in the nature of an injunction against criminal

---

12. Note, 25 N. C. L. Rev. 486, 487 (1947).

13. *Shields* v. *Utah Idaho Cent. R. Co.*, *supra*.

14. *Rochester Telephone Corp.* v. *United States*, *supra*.

15. *Connecticut Mutual Life Ins. Co.* v. *Moore*, *supra*.

16. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912).

17. *See also*: *Alvater* v. *Freeman*, 319 U. S. 359 (1943).

18. *Hill* v. *Florida*, 325 U. S. 538 (1945); *Cf. United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940).

DARK PAGE

prosecution, pre-enforcement relief is available.[19] The issuance of the order itself, part of the regulatory scheme, as are the "Orders of Supervision", is sufficient notice of full enforcement of the statutory scheme to constitute the threat requisite to invoke equitable jurisdiction.[20] Particularly where the directives of the order are couched in language so vague as to render even purported compliance a risk, as is the language in the "Orders of Supervision", specific threat of the invocation of the criminal sanctions of the act is not of the essence.[21] The risk involved in violation of the "Orders of Supervision" is not prosecution for a single transaction. The "Orders", in effect, create an entire way of life for the appellants. In a single week, were the appellants to assume to live as though the "Orders" were not extant, the pyramided penalties for violation could jail them for the balance of their lives, and fines imposed could total more than their life-time's expectation of income. Historically, in such circumstances, courts of equity have acted to avert such injury.[22]

From the view of declaratory judgment or injunction actions, the lower court's decision would appear to be an anachronism and in conflict with precedent established by this Court.

The controversy between the parties is justiciable, in the Constitutional sense, under any view of the form of procedure pursued by the appellants.

---

19. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Dobbins* v. *Los Angeles*, 195 U. S. 223 (1904); *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207 (1903).

20. *City Bank* v. *Schnader*, 291 U. S. 24 (1934).

21. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925).

22. *See e.g.*: *Ex parte Young*, 209 U. S. 123 (1908); *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

GE BLEED THRU

B.

The Merits of the Case

I. Section 1252(d), on its face, deprives appellants of procedural due process in violation of the Fifth Amendment and, as applied, violates Article 1, Section 9 of the United States Constitution.

(a) Section 1252(d), on its face, violates the due process clause of the Fifth Amendment.

In *United States* v. *Spector*, 343 U. S. 169 (1952), the Supreme Court had before it Section 20(c) of the Immigration Act of 1917, as rewritten in Section 23 of the Internal Security Act of 1950 [8 U. S. C. A. §156(c)], which is presently rewritten as Section 242(e) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. §1252(e)]. That statute, in the words of Mr. Justice JACKSON, "creates a crime * * * based on unlawful residence in the United States. The crime consists of two elements, one, an outstanding order for deportation of an alien, the other, the alien's willful failure to leave the country or take specific steps toward departure." *United States* v. *Spector*, *supra* at 177.

The majority of the court did not consider the question of whether the statute, on its face, constituted a denial of procedural due process of law, for the reason that:

> "That question was neither raised by the appellee nor briefed nor argued here." [*Id.* at 172].

The Court added:

> "If it had been, we might consider it. [*Ibid*] * * * That question is not foreclosed by this opinion." [*Id.* at 173].

Mr. Justice JACKSON, speaking in dissent with the concurrence of Mr. Justice FRANKFURTER, characterized, as fol-

DARK PAGE

lows, the Court's omission to treat the procedural due process aspects of the statute. He stated:

> "The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel." [*Id.* at 180].

Mr. Justice BLACK, dissenting separately on the main issue decided by the majority, on this question, stated nevertheless:

> "My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by Mr. Justice Jackson, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz*, 333 U. S. 56, 78-81." [*Id.* at 174, ftn. 2].

Mr. Justice JACKSON, with the concurrence of Justices FRANKFURTER and BLACK, on the issue left open by the majority, considered the statute, on its face, to be unconstitutional, in reliance upon *Wong Wing* v. *United States*, 163 U. S. 228 (1896), for the following reason:

> "The Act does not permit the court which tries [the alien] for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted." [*Id.* at 177].

Section 1252(d) creates a crime analogous to that in the *Spector* case. It consists of two similar elements: one, an outstanding order for deportation of an alien; the other, the alien's willful or knowing failure to comply with regu-

GE BLEED THRU

lations of and restrictions upon his conduct imposed by the Attorney General. Read as Mr. Justice JACKSON reads the *Spector* section, Section 1252 clearly does "not permit the court which tries [the alien] for this crime to pass on the legality of his presence." Under Section 1252(d) also, the "production of an outstanding administrative order for [the alien's] deportation becomes conclusive evidence" of his deportability and the "consequent duty" to comply with the regulations of and restrictions upon his conduct. Neither does Section 1252(d) permit "inquiry into the correctness or validity of the order." Under it, too, "a deportation order is made to carry potential criminal consequences," and the administrative decision on the issue of unlawful presence is made "conclusive upon the criminal trial court," thus permitting this "vital element" of the crime to be established without a jury trial. *United States* v. *Spector, op. cit. supra* at 177-78.

Mr. Justice JACKSON concluded in the *Spector* case that since the "adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime," the government constitutionally, may not be permitted to "use the result as a conclusive determination of that fact in a criminal proceeding." *Id.* at 178, 179. The statute, in that it enabled such a procedure, he considered to be unconstitutional on its face as a violation of the Fifth Amendment. These same conclusions are impelled in the instant proceedings by the existence, in the section of the statute involved here, of identical constitutionally objectionable elements.

(b) Section 1252(d), as applied, is a bill of attainder and ex post facto law.

As applied to the facts of this case, Section 1252(d), in making the deportation orders against the appellants

DARK PAGE

"carry potential criminal penalties," is a bill of attainder and an *ex post facto* law in violation of Article 1, Section 9 of the United States Constitution.

The orders of deportation against the appellants rest upon the findings of fact and conclusions of law, under 8 U. S. C. A. §137 [now 8 U. S. C. A. §1251], that the appellants had been, after entry, members of the Communist Party.

The Act, under which the appellants were found deportable, obviously makes deportable members of an easily identifiable class, namely: "alien members of the Communist Party of the United States." This designation, as well, is one that differed from all prior designations of deportable aliens, which had theretofore been enacted into law by Congress. As Mr. Justice REED remarked in *Carlson* v. *Landon*, 342 U. S. 524, 535 (1952):

> "Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow of the government of the United States, but the Internal Security Act [8 U. S. C. A. §137] made Communist membership alone of aliens a sufficient ground for deportation."

The description of this class differs from other deportable aliens in prior deportation statutes, in that it describes a specified, named organization, not the undesirable characteristics of an organization which are deemed by Congress to indicate that an alien with such affiliation is an undesirable alien. *Mahler* v. *Eby*, 264 U. S. 32 (1924).

Nor can it be said that the designation of the "Communist Party" is the equivalent of the long-standing statutory class: an organization which advocates the violent overthrow of the Government, because it represents a rea-

GE BLEED THRU

sonable determination by Congress, based on adequate evidence, that the Communist Party is an organization which advocates the violent overthrow of the government.

This provision proscribing the Communist Party by name did not replace the expulsion provisions which had been previously employed against alien members of the Communist Party. The Internal Security Act [former 8 U. S. C. A. §137] kept, and the new Immigration and Nationality Act [8 U. S. C. A. §1251] still keeps, the provision expelling past and present alien members of any organization which advocates the violent overthrow of the government. There also remains the provision expelling aliens who themselves advocate such doctrine.

Thus, the deportation statute, under which the instant deportation orders were procured is, in that it is directed at the members of an easily identifiable class, in the nature of a bill of attainder. *United States* v. *Lovett*, 328 U. S. 303 (1946). And since it relates to past conduct, not theretofore subject to legal sanction, it is in the nature of an *ex post facto* law. *See*: *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952). *Galvan* v. *Press*, 347 U. S. 522 (1954) is not to the contrary insofar as the Court approved the constitutionality of the statutory designation of the Communist Party *eo nomine* only in terms of its reasonableness as a classification under the Fifth Amendment, and not with regard to the prohibitions of Article 1, Section 9 of the United States Constitution.

In the *Harisiades* case, *supra*, however, it was considered that, in line with prior adjudications, the constitutional objections to the deportation statute as a bill of attainder and *ex post facto* law could not prevail for the reason that a deportation proceeding was civil and not criminal in nature, and deportation itself, not punishment for a crime. The Court there declared:

DARK PAGE

> "It has always been considered that that which [is forbidden] is penal legislation. * * * Deportation, however, severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy, supra* at 594.

This was re-emphasized, as has been shown by Mr. Justice JACKSON, in the *Spector* case, in his statement: "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations." *United States* v. *Spector, supra* at 178.

Section 1252(d), however, as has been shown, adds such "criminal consequences and connotations". It, therefore, supplies the one element, the absence of which has been relied upon to uphold the constitutionality of the deportation statute which created the new category of deportables: "alien members of the Communist Party." Under the circumstances, as applied to these appellants, Section 1252(d) constitutes a bill of attainder and an *ex post facto* law.

II. Section 1252(d), on its face and as applied, deprives appellants of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

It is well-settled and existing law that aliens, except for liability to deportation and its "incidents", are to be accorded, as a matter of constitutional mandate, all property and civil rights and liberties accorded to citizens. *See, e.g. Chew* v. *Colding, supra* at 596, ftn. 5; *Bridges* v. *Wixon*, 326 U. S. 135 (1945). The political power of the government to expel aliens deemed undesirable, however, cannot be used to deprive them of these liberties and property

GE BLEED THRU

rights without due process of law. *United States ex rel. Ross* v. *Wallis*, 279 F. 401, 403 (C. C. A. 2d, 1922); *Petition of Brooks*, 5 F. 2d 238, 239 (D. C. D. Mass. 1925).

The power to hold in custody or otherwise restrict the liberty of deportable aliens, by administrative fiat and without judicial trial, has been permitted only as an "incident" to the power to deport or exclude, pending deportation proceedings, and "while arrangements were being made for their deportation." *Wong Wing* v. *United States, supra; see, Carlson* v. *Landon, supra.*

The Court of Appeals for the Second Circuit recently restated the rule, as extant law. In its decision in *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, 967 (C. A. 2d, 1952), the Court said:[23]

> "• • • the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See Walker v. Chief Quarantine Officer, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men • • • such confinement must violate the Fifth Amendment."
>
> "• • • But where • • • confinement is no longer justifiable as a means to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, 'whether citizens, aliens, alien enemies or enemy belligerents'. Rutledge, J., dissenting in Re Yamashita, 327 U. S. 1, 41, 42."

---

23. Reversed as inapplicable to an *excludable* alien as opposed to *deportable* aliens as are the appellants. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953).

Section 1252(d) fixes the period during which the Attorney General may hold an undesirable alien in confinement while arranging for his actual deportation. If he has not arranged for, or effectuated the alien's removal within six months after a final administrative order of deportation has been made, his power to detain the alien ends, and the alien must be given his freedom. See: *United States ex rel. Mezei* v. *Shaughnessy, supra* at 968; *United States ex rel. Kusman* v. *Shaughnessy,* 117 F. S. 541, 544-45 (D. C. S. D. N. Y. 1953); *United States ex rel. Blankenstein* v. *Shaughnessy,* 117 F. S. 699, 701, 703 (D. C. S. D. N. Y. 1953).

This provision has been construed to accord with constitutional mandates [*United States ex rel. Mezei* v. *Shaughnessy, op. cit. supra* at 967], and comports with judicial interpretation as to the propriety of the exercise of powers incidental to the right to deport. The courts generally have held that custody, whether by direct physical detention or by other control, pending actual deportation, which exceeds four to six months, constitutes an unreasonable and, therefore, an unlawful restraint. *United States ex rel. Ross* v. *Wallis, supra; Petition of Brooks, supra; Saksagansky* v. *Weedin,* 53 F. 2d 13 (C. C. A. 9th, 1931); *United States ex rel. Dzuro* v. *District Director,* 102 F. S. 704 (D. C. S. D. N. Y. 1951).

Subsection (d) of Section 1252, however, purports to extend authority to exercise powers, normally incidental to deportation, even after the power to deport has become—either temporarily or permanently—inviable, by reason of the inability to effect deportation. The Attorney General is authorized and directed to supervise and impose conditions and restrictions upon the life, liberty and property of those aliens whose removal from the United States has been ordered, but cannot or may not be effected, for an un-

limited time after, by statute—the same statute—the power to detain to make "arrangements" for deportation, has ended.

These powers transcend the political power of the government to deport and to restrain or regulate as an "incident" to deportation. Since the conditions and restrictions which Section 1252(d) prescribes be placed upon an alien's liberty and property may, under the terms of Section 1252(d), be imposed without resort to "those indicia of legal procedure that are embedded in the constitution as the right of all men," they constitute an illegal and unconstitutional deprivation of the alien's liberty and property. The statute, in that it authorizes such deprivations, violates, on its face, the due process provision of the Fifth Amendment.

In *Wong Wing* v. *United States, supra*, this Court clearly determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and, constituted a violation of the Fifth Amendment. The Court struck down the "Geary Act" [Section 4, Act of May 5, 1892] as a transgression of the Fifth Amendment, for authorizing a year's imprisonment for Chinese aliens found, without judicial trials, to be in this country unlawfully. It held that Congress cannot "promote its policy in respect to Chinese persons by adding to its provisions for their expulsion and exclusion punishment by imprisonment at hard labour", inflicted without judicial trial. *Id.* at 235.

The rationale of the Court relating to the Geary Act is clearly applicable to Section 1252(d), which is its analogue. The Geary Act, in the view of the Court, without judicial trial, deprived Chinese aliens of liberty by authorizing their imprisonment for a year. Section 1252(d) similarly seeks, without judicial trial, to deprive aliens of liberty

DARK PAGE B

and property by subjecting them to supervision which does and may further circumscribe their movements, restrict and impair their normal living and their right to work for an unlimited period of time—conceivably as long as they may live or until their departure from the United States can be effected. "Liberty" is not restricted in its import to freedom from imprisonment. This Court, in its recent decision, *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954) ruled:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * * "

See also: *Williams* v. *Fears,* 179 U. S. 270, 274 (1900); *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589 (1897); *Bauer* v. *Acheson,* 106 F. S. 445, 450 (D. C. D. C. 1952).

That the power to deport does not, as well, include the right, without judicial trial, to restrict and impair freedom, liberty and property rights of aliens, although short of actual imprisonment, was sharply enunciated by Circuit Judge Anderson in *Petition of Brooks, supra.* The order of deportation against the alien in that case, concededly, could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge Anderson rejected this contention as unlawful and pointed out:

> "He is entitled to be deported or to have his freedom * * * any further detention by the Immigration authorities *or control of* [*the alien's*] *freedom is illegal.*" [at 235, 240] (Emphasis added.)

The conditions circumscribing and restricting the lives and livelihoods of the instant appellants, authorized by the

E BLEED THRU

statute and imposed by the appellee, are such a "control of [their] freedom" as to render illegal both the statute, the regulation and the "Orders of Supervision" requiring the appellants to conform to the conditions.

Subjection to "supervision" is itself a "control of freedom" of far greater consequence than the control by bond in *Petition of Brooks, supra.* The statute here, moreover, requires and the "Orders of Supervision" direct the appellants to report to an officer of the Immigration and Naturalization Service, a restriction of freedom disapproved in *Petition of Brooks, supra.* The requirement that the appellants appear for medical or psychiatric examination is clearly of the same nature. The requirements of some of the appellants that they remain within a 50 mile radius of Times Square and remain residents of the Third Immigration District, unless with express permission of the appellee to be granted or withheld in his unrestricted discretion, are clearly deprivations of their liberty. In *Williams* v. *Fears, supra,* this Court declared:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the constitution." [at 274]

Accord: *Bauer* v. *Acheson, supra; Walker* v. *Chief Quarantine Officer,* 69 F. S. 980, 983 (D. C. D. Canal Zone Div. 1943).

The appellants are required to relinquish membership in the Communist Party—not in itself illegal; cease all support of, and all activities on behalf of all policies and doctrines of the Communist Party and its "affiliates"—whether legal or not; end their association with all members of the Communist Party or its affiliates, whether political in character, social or business, innocent or otherwise; to supply any and all information regardless of con-

DARK PAGE BLEED

titutional or common law privilege. The right to be free f such restrictions is a right accorded to aliens, and is un- leniable, even after "judicial trial," as an infringement of 'irst Amendment rights.

The "supervision" authorized by the statute is of such latitude that it may be employed to—and in fact has— ffect or deprive the appellants of their jobs and liveli- oods, a property right which is theirs under the Consti- ution. *See*: *Takahashi* v. *Fish Comm'n*, 334 U. S. 410 1948) and cases cited therein.

The deprivation of the rights and liberties authorized by Section 1252(d) and accomplished here by the "Orders of Supervision", under circumstances where the exercise of he power to deprive no longer rests on the power to de- ort or powers incidental thereto, violates the Fifth Amendment, since the restrictions on liberty and property re imposed without due process of law, but by adminis- rative fiat.

In *Carlson* v. *Landon, supra,* the approval of the exer- ise of discretion to detain, based on the statutory cri- erion that detention would serve to eliminate an arrested lien's "opportunity to hurt the United States," hinged on he incidental power to detain *pending determination of leportability,* an area within the plenary power of Con- ress to expel, apparently, under the *Carlson* case, without et or hindrance from the Fifth Amendment. The rationale f the *Carlson* case is inapplicable here. In the instant ases, the deportation proceedings are completely at an nd, and deportation has become "patently impossible" or an unforseeable period of time. The Congress may not 'promote its policy" to protect the United States from he alleged activities which allegedly render an alien unde- irable, "by adding to its provision for their expulsion and xclusion" deprivations of life, liberty and property with- ut judicial trial. *Wong Wing* v. *United States, supra.*

ED THRU

There exist still in the nation, for its protection, investigative agencies, criminal statutes, and "the speedy indictment and trial of actual crime in the courts." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 969. No other mode may be adopted consonant with constitutional due process.

III. Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth and Eighth Amendments to the United States Constitution.

(a) Section 1252(d) inflicts punishment without due process of law in violation of the Fifth Amendment.

In *Cummings* v. *Missouri*, 71 U. S. 277, 320 (1866), this Court established the proposition that:

> "The deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact. * * *"

The statute in question here permits the deprivation of, and the "Orders of Supervision" made against the appellants, deprive them of liberty, and rights—civil, political and property. In the circumstances under which these seemingly civil disabilities are authorized and were applied here, they constitute punishment. *See also*: *Ex parte Garland*, 71 U. S. 333 (1866); *Pierce* v. *Carskadon*, 83 U. S. 234 (1872); *Burgess* v. *Salmon*, 97 U. S. 381 (1878); *Harisiades* v. *Shaughnessy, supra*. The single "circumstance" that will render a civil disability a penalty or a punishment, is the absence of a reasonable relation to the power which the civil disability is intended to aid. *Cummings* v. *Missouri, supra* at 319-20.

Congress has, concededly, the plenary power to deport aliens it deems undesirable. As an incident to this power,

DARK PAGE B

it may authorize the control or the restriction of an alien's liberty pending deportation and while arrangements are being made for the actual deportation, on criteria which it deems fit, including its evaluation of the effect of the alien's freedom upon the welfare of the nation. [*See*: *Carlson* v. *Landon, supra*]. The power to employ such a criterion, as a basis for detention or control, ends when the power to detain or control ends: with the termination of the proceeding to deport and at that time when "deportation becomes patently impossible." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 967; *Wong Wing* v. *United States, supra.*

The power to "supervise" granted by Section 1252(d) and the "supervisory" power exercised over these appellants, have no reasonable relation to the exercise of any of the powers which Congress may exercise or authorize over deportation and the deportable alien. It is possible to see, from an analysis of the "Orders of Supervision" this lack of relation, which displays, as the oath in the *Cummings* case, *supra,* the punitive purport of the "Orders":

> "It was required to reach the person, not the calling. It was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." [at 320]

That the statute was not intended to be directed at control of the alien pending the conclusion of deportation proceedings, is patent from the fact that Section 1252(d) does not become applicable until six months after the final conclusion of a deportation proceeding. It is likewise clear that it is not a temporary control while arrangements are

E BLEED THRU

being made for deportation, for it is precisely the impossibility of effecting deportation within the prior six months that juvenates the power to supervise under Section 1252(d). And it comes into effect after that period during which the determination as to whether to control or not to control the liberty of the alien may be made on the basis of an evaluation that it is necessary for the welfare of the nation.

Nor can it be said that the statute or the "Orders of Supervision" are related to a power, perhaps inherent in the power to deport: to insure the capacity to deport and to avoid the frustration of that power. The disabilities imposed by the "Orders of Supervision" which most clearly indicate the punitive character of all of the disabilities, even those innocent on their face, appear in paragraphs 6 and 7 of the "Orders". [In some instances, the paragraph numbers are 5-a and 5-b.]

Paragraph 6 commands the appellants to terminate their membership in the Communist Party and its "affiliates" and their support and activity in behalf of the doctrines and policies of both. Paragraph 7 requires that the appellants refrain from any, or any type of association with members of the Communist Party and its "affiliates" or persons who support the doctrines or policies of either.

It is clear that mere membership in the Communist Party is not a crime. *See*: *Rogers* v. *United States*, 340 U. S. 367, 372, ftn. 12 (1951); 50 U. S. C. A. §783(f). It must, therefore, necessarily be so that other or different "associations" between Communists may be equally innocent. Nor has every policy or doctrine of the Communist Party been declared—even by the courts—to be unlawful [*United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2d, 1950)], nor in fact, may they be made so. *See*: *Jamison* v. *Texas*, 318 U. S. 413 (1943). Paragraph 6 and 7 of the "Orders of

DARK PAGE

Supervision" deprive the appellants of their rights to these legal associations, to income which accrues to some of them as a result of these legal associations, and punishes a breach of the inhibitions against those associations by criminal penalties. Of these paragraphs, propounded under the aegis of Section 1252(d), it may be truly said, as in the *Cummings* case: "* * * it was thought that the several acts deserved punishment, and * * * there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

The remaining paragraphs of the "Orders" establish, as a substitute for the jail to which these appellants may not be sent, a system of police surveillance over their lives that differs only in degree, but not in kind, from imprisonment, and is, in fact, in the nature of a house arrest. They are limited in their travel area and their unrestricted choice of residence. They must report in person. Subsection (3) of the statute and paragraph 2 of the "Orders", providing for physical and mental examination and sweeping unlimited interrogatories, subject the appellants, as Justice BLACK, for the majority, stated in *Hines* v. *Davidowitz,* 312 U. S. 52, 71 (1941): "to a system of indiscriminate questioning similar to the espionage systems existing in other lands." An innocent purpose is not to be attributed to these regulations. They are not needed here to insure the deportation of these appellants. The "Orders" require that the appellants appear for deportation, when it can be effected [Paragraph (1)]. Their whereabouts are constantly known to the government by virtue of their alien registration, pursuant to 8 U. S. C. A. §1302, and changes in their residence must also be made known, and have been. These appellants, heretofore, have met their legal obligations to appear at all times when they might have been legally summoned.

Section 1252(d) authorizes, and the "Orders" herein provide a substitute for prison and penalties. They are punishment. Inflicted without due process of law, and solely by administrative fiat, they are in violation of the Fifth Amendment.

(b) Section 1252(d) inflicts cruel and unusual punishment in violation of the Eighth Amendment.

The Eighth Amendment, by its terms, prohibits the infliction of "cruel and unusual punishments." It was conceived, along with the other protections of the Bill of Rights, as a stricture against tyrannical encroachment upon the democratic rights of the people. 2 Story, *Commentaries on the Constitution* (5th Ed., 1891), Sec. 1903; Whalen, *Punishment for Crime: The Supreme Court and the Constitution,* 35 Minn. L. Rev. 109, 111 (1951); 3 *Elliott's Debates* 447, 448. Its initial purport may have been adumbrated by the long course of its usual employment as a protection against inhuman, barbarous or torturous punishment, or the "wanton infliction of pain." See: *Louisiana* v. *Resweber,* 329 U. S. 459 (1947). Yet the force of its original conception has not been lost to this Court. In *Weems* v. *United States,* 217 U. S. 349, 372-3 (1910), it stated:

> "* * * Surely they [authors of the Amendment] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprison-

DARK PAG

> ment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. *We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty', because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny*; of zeal for a purpose, either honest or sinister." (Emphasis added.)

In its most profound import, therefore, the Amendment's prohibitions are recognized to fall upon punishment whose imposition is designed to, or which tends to enforce, or which has the effect of enforcing, political conformity to the concepts of the sovereign. The kind, character and degree of punishment must be measured, case by case, against the yardstick of its power to bring about this illegitimate end. *See*: *Weems* v. *United States, supra; United States* v. *Ragen*, 54 F. Supp. 973 (D. C. N. D. Ill. E. D. 1944), *aff'd* 146 F. 2d 349, *cert. den.* 325 U. S. 865.

The controls on the appellants' liberty and property, authorized by Section 1252(d) and imposed by the "Orders of Supervision", constitute punishment. [*See*: *supra*, III (a)]. This punishment is of the kind whose "coercive cruelty" is such as to have the effect of enforcing political conformity and the abjuration of non-conformist, and, more particularly, Communist doctrines and policy, whether innocent or not. The punishment, quite obviously, is directed at the appellants as alleged Communists, and at their beliefs and activities. The disabilities which they

AGE BLEED THRU

are made to suffer are extended, if not perpetual. They are prohibited from exercising their conceded constitutional rights to be and speak as Communists, if Communists they are. They are consigned to a life of police surveillance over body, mind and thought, and are put under virtual house arrest. If these oppressive conditions may be imposed on these aliens, others, to avert the catastrophe of living under the heel of an administrative Czar, may forego the privilege of holding the ideas or engaging in the activities which can bring about such a condition. This is precisely the type of punishment—"coercive cruelty"—the Eighth Amendment was designed to prevent, and does prohibit.

IV. Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

It has been the well-settled law since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantee of equal protection of the laws extends not only to citizens, but to aliens as well. In the recent case of *Takahashi* v. *Fish Comm'n*, *supra*, this Court expressed the extant law to be:

> "The Fourteenth Amendment and the laws adopted under its authority * * * embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [at 420]

It has been held that the due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations—concepts which are the core of the equal protection clause. See *Detroit Bank* v. *United States*, 317

DARK PAG

U. S. 329 (1943); *Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Carleton Screw Products Co.* v. *Fleming,* 126 F. 2d 537 (C. C. A. 8th, 1942), *cert. den.* 317 U. S. 634; *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (Em. Ct. App., 1945), *cert. den.* 324 U. S. 865.

A fortiori, the Fifth Amendment, just as the Fourteenth, constitutes a protection for the alien from statutes which impose upon him, by reason of alienage alone, certain burdens. *Wong Wing* v. *United States, supra.* Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States, renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what non-citizens shall be permitted to remain within our borders." *Carlson* v. *Landon, supra* at 534. The power to detain, or, instead, to impose regulations on conduct to insure the deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon, supra* at 538. Where, as has already been demonstrated, the power to deport ceases or is rendered ineffectual, constitutional authority to exercise the powers over the alien, incidental to deportation, ceases. By the terms of Section 1252, the authority to detain, or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation. The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is legally resident in the United States, until such time as he can be deported, and a beneficiary of the rights guaranteed by the Constitution to all people within our borders.

Section 1252(d) seeks to impose upon the alien whose deportation cannot be effectuated within the six months period, a series of requirements and restrictions, unrelated to the deportation or effectuation of the deportation of the alien. The controls sought to be imposed by Section

AGE BLEED THRU

1252(d) relate rather to control of the conduct deemed "undesirable." The regulations of conduct, activity or association authorized by the statute on its face and, more specifically as applied here, neither this law, nor any other, prescribes for a citizen.

There is little question that the character of conduct, activity and association included in the 17 categories of aliens legislatively declared undesirable [8 U. S. C. A. §1251] would be and is considered equally undesirable on the part of citizens. This is evidenced by the fact, certainly as to the conduct which it has been found rendered the appellants deportable, of the existence of penal statutes proscribing such conduct. *See*: *e.g.* 18 U. S. C. A. §2385; 50 U. S. C. A. §783.

The conduct, activity, or association rendering aliens "undesirable" and deportable, therefore, cannot reasonably set such aliens apart from citizens engaged in the same allegedly "undesirable" conduct, activity, or association, in terms of the control of such activities. No more harm results to the nation from one than the other. *See*: *Wong Wing* v. *United States, supra.* Both are subject to the same penal sanctions designed to safeguard the society and the nation. In *United States ex rel. Mezei* v. *Shaughnessy, supra,* the Court of Appeals for the Second Circuit stated:

> "* * * we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; the speedy indictment and trial of actual crime in the courts still obtain." [at 969]

The burdens imposed by Section 1252(d), on its face and as applied here, upon aliens, is, patently, by reason of alien-

DARK PAG

age alone. Clearly then, the statute which authorizes the imposition of these regulations, the rules promulgated thereunder, and the "Orders of Supervision" issued in alleged pursuance thereof, deprive the appellants of the equal protection of the laws in violation of the Fifth Amendment.

V. Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(a) Section 1252(d) is an unlawful delegation of power.

Section 1252(d) commends "any alien" against whom a final administrative order of deportation has been outstanding for more than six months, to the supervision of the Attorney General under regulations prescribed by him.

For such a delegation of power to be constitutionally valid under Article 1, Section 1 of the Constitution, the statute must declare a guiding "policy", or establish a "rule", or an "intelligible principle", or such policy, rule or principle must be found in the "purpose of the act, its factual background and the statutory context in which they appear." *United States ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537, 543 (1950); *Lichter* v. *United States*, 334 U. S. 742, 785 (1948); *American Power & Light Co.* v. *Securities & Exch. Comm'n*, 329 U. S. 90, 104-5 (1946); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935).

The section itself establishes no policy or rule or principle to limit or guide the Attorney General in framing regulations which constitute his supervision of aliens. Although subsections (1), (2) and (3) of Section 1252(d) appear to direct, specifically, the character of certain supervisory

regulations, subsection (4), which requires an alien "to conform to such reasonable written restriction on his conduct and activity as are prescribed by the Attorney General," invests the Attorney General with an unlimited and undefined power, not only to regulate beyond the specific prescription of subsections (1), (2), and (3), but as to any other matter he may choose.

While it has been said that the Congressional purpose in deportation laws, at least as to alleged Communist aliens, in terms of securing their expulsion and protecting American society from such activity on their part pending deportation, provides an adequate statutory guide [*See*: *Carlson* v. *Landon, supra* at 543-4], it is clear from the terms and provisions of Section 1252(d) that this standard is obviously not intended to be the guide to the administrative discretion to be exercised under Section 1252(d).

Subsection (3), for instance, requires an alien to submit to interrogation, not only as to his "nationality, circumstances, habits, associations, and activities," but, as well, concerning "such other information, *whether or not related to the foregoing.*" (Emphasis added.) The delegation of power to demand information, thus unrelated, grants to the Attorney General a roving commission. No corner of an alien's mind, no idea, no belief, no thought, is free from administrative scrutiny. No business activity, political activity, or personal activity is free of the power to interrogate. No association, no matter how innocent, licit, or personal, is protected by the right to privacy.

It is difficult to understand, on the face of it, the relationship between the requirement that *any and every* deportable alien be required to subject himself, under subsection (2), to medical and psychiatric examination, and the eventual effectuation of his deportation or the protection of the community pending it. As to mental defec-

DARK PAG

tives or prostitutes, perhaps a relationship exists. But why as to Communists? And how frequent an examination is needed to protect the community? Once a week? Every day? Twice a day? Must the alien be ill? Or may he be subjected to examination even if well? There is no guide provided in the statute to direct the Attorney General, or to prevent him from converting this subsection into an instrument of harassment or oppression.

In the instant case, under subsection (1), the appellants are required to appear personally, a condition, which, as to some creates a severe physical hardship, and as to all a serious interference with lawful, gainful occupations. Yet, under the terms of the subsection, the Attorney General may require daily reporting, which would render it impossible to retain any job. For the statute sets no standard for how much "identification" is necessary to insure the alien's deportation or to "protect" the community until the alien may be deported.

Subsection (4) is a *carte blanche.* The Attorney General, under it, may, without restriction, control the alien's life. Here, many of the "Orders of Supervision" limit travel to a 50 mile radius from Times Square. Under the statute, the Attorney General is as free to make it 10 miles, or to confine the alien to his own home and yard. Is the Communist less of a "menace" in the Times Square area than on the eastern shore of Maryland or on the Connecticut Sound? Or perhaps is there greater safety in some American-created Siberia?

Here some of the appellants are required to discontinue their membership in the Communist Party, although to do that, would mean the loss of their lawful jobs, their only source of income. If this may be accomplished thus indirectly, has the Attorney General not the power to order that they resign other lawful jobs or forfeit other financial benefits? And has he not as well the power to order them

PAGE BLEED THRU

to resign from the American Legion, the Catholic Church, the National Association for the Advancement of Colored People? He has ordered the appellants to cease their associations with other Communists, although some of them must continue such associations to maintain lawful occupations or would desire to continue such associations to extend lawful social relations, many of long standing. If this may be accomplished thus indirectly, is the appellee not free to order them to stop association with all other Americans, on the "germ" theory of the spread of Communism and thus place the appellants in virtual solitary confinement within their 50 mile circle?

By virtue of the delegation granted by Section 1252(d), to control the lives of and restrict the liberty of aliens—violation constituting a felony bearing criminal penalty—the Attorney General has been given a free hand. In fact, by virtue of the criminal penalty, he has been given power to legislate a series of crimes, for conduct or activity, which is not otherwise, and, in some instances, could not be made criminal.

The "Orders of Supervision" here were made in alleged pursuance of such an unlawful delegation of power. The "Orders" and the statute must, therefore, be declared invalid and void and in violation of Article 1, Section 1 of the United States Constitution.

(b) 8 C. F. R. §242.3(c) is an unlawful re-delegation of legislative power.

The unrestricted power granted by Section 1252(d) has been unrestrictedly re-delegated by the Attorney General, under 8 C. F. R. §242.3(c) to the "district director, district enforcement officer, or officer in charge, having administrative jurisdiction over the office in which the detention or release of [the] alien was authorized," although the statute placed the power in the Attorney General him-

DARK PAGE

self. Even in a situation in which no specific rule authorized such a delegation, Justice BLACK, dissenting in *Carlson* v. *Landon, supra,* questioned the constitutionality of such a delegation. He stated:

> "It is bad enough to read an Act as vesting even the Nation's chief prosecutor with power to determine what individuals he prosecutes should be held in jail without bail. Delegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions. I am not willing to imply that Congress has granted power to make such delegations which so ominously threaten the liberty of individuals." [at 554]

(c) The supervisory conditions imposed here are a usurpation of a legislative power.

It is well settled that: "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter,* 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Products Corp.,* 315 U. S. 475, 489 (1942).

(1) *As to Paragraphs 6 and 7 of the "Orders of Supervision"*

Section 4(f) of the Internal Security Act of 1950 [50 U. S. C. A. §783(f)] provides:

GE BLEED THRU

> "Neither the holding of office nor membership in any Communist organization shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

Yet paragraphs 6 and 7 of the "Orders of Supervision" [in some instances 5-a and 5-b] proscribe membership in the Communist Party and its "affiliates". Violations of the proscriptions of paragraphs 6 and 7 become subject to the criminal penalties provided by Section 1252(d). The action of the appellee, therefore, in incorporating paragraphs 6 and 7 in the "Orders" "has the effect to subject * * * persons to fines and penalties under the act, that are excluded therefrom, by the terms of" the Internal Security Act of 1950.

Clearly this assumption of power by the administrative officer, contrary to the express policy and provision of Congress, is a usurpation of Congress' legislative function, in violation of Article 1, Section 1 of the Constitution.

(2) *As to paragraph 8 of the "Orders of Supervision"*

Paragraph 8 of the "Orders of Supervision" [in some instances 5-c] direct that the alien:

> "* * * shall not violate sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Sec. 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

Section 2385 of the "Smith" Act provides that as the penalty for its violation, the convict:

> "Shall be fined not more than $10,000 or imprisonment not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

DARK PAG

The penalty section of Section 4 of the Internal Security Act provides:

> "Any person who violates any provision of this section, shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Clearly it was the design of Congress that *these* should be the penalties for violating either law. The inclusion of a further prohibition against their violation in the "Orders of Supervision"—an obvious redundancy in light of the existence of the statutes—has the effect, only, of increasing the penalties for their violation by applying to such violation the additional criminal penalties of Section 1252(d): namely, an additional year's imprisonment and fine of an additional $1,000.

Of such administrative action, this Court said in *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 404 (1944):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey,* 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599; *Wallace* v. *Cutten, supra,* [298 U. S. 229]."

Paragraph 8 is, therefore, manifestly a violation of Article 1, Section 1 of the United States Constitution.

VI. Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States.

A statute which, on its face and as applied, is so vague and indefinite, as to permit within its scope its administrators and enforcers, to burden, prohibit or make criminal, conduct and belief which are constitutionally permissible and protected, violates the Fifth Amendment and, as well, the constitutional provision protective of the exercise of such conduct or the holding of such belief. *Winters* v. *New York*, 333 U. S. 507 (1948); *Herndon* v. *Lowery*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

(a) As to Subsection (4).

Subsection (4) of Section 1252(d), in according to the Attorney General an undefined latitude to impose "written restrictions on [the alien's] conduct and activity," and in making criminal their violation, is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York, supra* at 509. An alien, whether deportable or not, while in residence here is entitled the guarantees of freedom of speech, press and association protected by the First Amendment. *Bridges* v. *Wixon, supra; see*: *Chew* v. *Colding, supra.*

The statute, as applied in the instant case by the "Orders of Supervision," does in fact create restrictions upon the conduct of the appellants which deprive them of First Amendment rights. The "Orders of Supervision" command each of the appellants, with minor deviations in some instances, to:

> "* * * terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Com-

DARK PAG

munist Political Association, the Communist Party of any state, or of any foreign state, or any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization."

"* * * refrain from associating with any person, knowing or having reasonable ground to believe that such a person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in [the above] Paragraph."

The mere statement of these blanket prohibitions is adequate to demonstrate that they are the type of ban that is prohibited by the First Amendment's guarantees of freedom of speech, press and assembly. *American Communications Association* v. *Douds, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931). The Communist Party has never been declared illegal, nor membership in it or association with it, *per se,* a crime. *See*: *Rogers* v. *United States,* 340 U. S. 367, 372 (1951). On the contrary, mere membership has been statutorily declared not to be a crime. [50 U. S. C. §783(f)]. Nor has every policy or doctrine attributed to the Communist Party been declared—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. *See*: *Jamison* v. *Texas,* 318 U. S. 413 (1943).

Furthermore, the language of the prohibitions referred to above is so vague and indefinite as to make it impossible for the appellants to ascertain what it is they must or may not do, under criminal penalty, in violation of their rights under the Fifth Amendment. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const. Co.,* 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921).

AGE BLEED THRU

What is to be deemed "support" of doctrines and policies of the Communist Party? Does it mean public speech making? Or does it prohibit, as well, approval expressed over the dinner table to friends or neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed? Does it mean working, for pay, for such an organization, whether as a file clerk or as a director?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines and policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine or policy adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"?

What is to be deemed an "affiliate" of the Communist Party, from which the appellants must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Party, or of the Communist Parties of the various states, or political or geographical subdivisions of the states, or of the various foreign countries. *See*: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123

DARK PAGE

(1951). Will the appellee deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom shall the appellants refrain from associating? What is meant by "associating" under this paragraph? Does it mean "associating" in the Communist Party? Or does it mean that they shall not pass the time of day with a Communist on a street corner? Does it mean that, in the course of legitimate work, they may not speak to a Communist in connection with it? May they not invite Communists to their homes for a social Saturday evening? Must they forsake life-long friends who may be Communists?

What is "reasonable ground to believe" that a person is a Communist? Must the appellants become insurers of the political probity of each person that they meet? Is there a burden on the appellants to inquire of people if they are Communists? If the answer is: "No," are the appellants entitled to believe the answer, or must they investigate the truth of it? How are the appellants to know whether such a person is engaged in the "promotion of any of the activities" mentioned in the "Orders of Supervision" when it is all but impossible to ascertain what "activities" are referred to or what "affiliations"?

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the appellants must make such determinations at the risk of criminal indictment. As this Court recently said in *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what per-

E BLEED THRU

> sons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

By virtue of the undefined latitude of subsection (4) of Section 1252(d), the Attorney General, in the "Orders of Supervision," deprives the appellants of the liberty—without due process of law—to travel beyond a radius of 50 miles from Times Square. Such restrictions on freedom of movement have been held to be deprivations of liberty in violation of the Fifth Amendment. See: *Williams* v. *Fears, supra; Allgeyer* v. *Louisiana, supra; Bauer* v. *Acheson, supra.*

Similarly, the indefiniteness of subsection (4) has enabled the appellee to impose the condition, contained in paragraph 3-b of the "Orders of Supervision", that the appellants may not change their places of residence without the express permission of the Immigration Service, to be granted or withheld in its apparently unrestricted discretion. Not only does this condition constitute the same type of deprivation of liberty as the 50-mile travel restriction, but it has been and may, as well, be applied to frustrate a removal of residence designed by the appellants in aid of their employment, or to secure or better their livelihoods—property rights which accrue to them under the constitution. *See*: *Takahashi* v. *Fish Comm'n, supra.*

(b) As to Subsection (3).

Subsection (3) of Section 1252(d) authorizes the Attorney General to, and by paragraph 2 of the "Orders of Supervision" he requires the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, whether or not related to the foregoing as the Attorney General may deem fit and proper." Failure to comply with such a direction renders the alien subject to the criminal penalties of Section 1252(d).

DARK PAGE

The courts have held that aliens are entitled, even in a pending deportation proceeding, to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment. *Schoeps* v. *Carmichael*, 177 F. 2d 391, 400 (C. A. 9th, 1949), *cert. den.* 339 U. S. 914; *United States ex rel Mezei* v. *Shaughnessy, supra* at 968. The language of the instant statute, on its face and as applied here, is broad enough to permit the interrogation on subject matters and compel responses, under threat of criminal penalty, concerning matters which may tend to incriminate the alien within the meaning of the Fifth Amendment. Such statutory compulsion renders a statute violative of the self-incrimination clause of the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Smith* v. *United States*, 337 U. S. 137 (1949). The language of 1252(d), which is so broad as to encompass such compulsion, renders Section 1252(d) void in violation of the Fifth Amendment. *Cf. Winters* v. *New York, supra.*

(c) As to Subsections (1) and (2).

Subsections (1) and (2) of Section 1252(d), requiring appearance for identification "from time to time" and for medical and psychiatric examination "when necessary" are so indefinite in their direction, as to permit the Attorney General to convert those requirements into means of depriving an alien of his liberty or property.

"From time to time," or "when necessary" is not a limitation, but an absence of limitation. The Attorney General is free to compel an alien to appear daily or twice or three times a day, making such appearances a virtual substitute for physical detention. This reporting may become so frequent as to make the strain of it a serious threat to the alien's health, or so time-consuming as to make it impossible for an alien to retain a job to support himself or his family. In the instant cases, it seriously affects both aspects of the appellants' lives.

Such an undefined grant of power cannot be squared with the Fifth Amendment.

VII. The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power.

Section 1252(d) requires that the restrictions imposed by the Attorney General on the conduct or activity of the alien be "reasonable". Each of the appellants, in his complaint and affidavit in support of his motion for temporary relief, has set forth facts to establish that, as to each of them, the regulations of and restrictions upon his conduct are unreasonable and an abuse of power. It is submitted that, even assuming *arguendo* the constitutional validity of Section 1252(d) and the provisions of the "Orders of Supervision," the "Orders," being unreasonable, are illegal and should not be enforced.

CONCLUSION

Plenary consideration of this appeal should be afforded to the appellants and the decision of the court below reversed.

Respectfully submitted,

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Appellants.

DARK PAGE BL

APPENDIX

Opinion of Statutory Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285, 93-286, 93-287, 93-288, 93-289, 93-290, 93-291, 93-292, 93-293, 93-294, 93-228

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Civ. No. 87-98, 87-99, 87-124

BETTY GANNET, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Before: MEDINA, Circuit Judge, and
McGOHEY and WEINFELD, District Judges.

BLEED THRU

Opinion of Statutory Court

BLANCH FREEDMAN & GLORIA AGRIN, Attorneys for Plaintiffs.

J. EDWARD LUMBARD, United States Attorney, Attorney for Defendant; HAROLD R. TYLER, JR., HAROLD J. RABY, Assistant United States Attorneys and LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service, of Counsel.

MEDINA, Circuit Judge:

The pleadings and issues in the fourteen actions before us are substantially the same. Each of the plaintiffs is an alien who has been ordered deported from the United States after appropriate administrative proceedings which none has sought to review by any judicial proceeding. The order of deportation in each case was based on an administrative finding that, after entering the United States, the plaintiff had been a member of the Communist Party of the United States. Final orders and warrants for the deportation of each of the plaintiffs have been outstanding for more than six months.

Three of the plaintiffs, namely, Gannet, Bittleman and Jones, have not been deported primarily because they were tried and convicted of violations of the penal provisions of the Smith Act for conspiring to advocate the overthrow of the United States Government by force and violence. These plaintiffs have been sentenced to various terms of imprisonment and are now at liberty on judicial bond pending their appeals in the criminal action. With respect to the other eleven plaintiffs, they have not been deported by reason of the inability of the immigration authorities physically to effectuate deportation. Some of the plaintiffs are so-called "stateless persons"; others have been denied, temporarily at least, readmittance to the countries of their nativity or last residence prior to coming to the United States.

Since more than six months have elapsed from the entry of the final orders of deportation, the defendant has released the plaintiffs from custody on supervised parole in accordance with the express provisions of Section 242(d) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252(d),[1] and the regulations promulgated thereunder, 8 C. F. R. §242.3(c),[2] the constitutionality of which plaintiffs now seek to attack.

---

1. Section 242(d) of the Immigration and Nationality Act of 1942, 8 U. S. C. §1252(d), provides as follows:

"(d) *Supervision of deportable alien; violation by alien.*

Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

2. 8 C. F. R. §242.3(c) provides as follows:

"(c) *Release; supervision after six months' period has expired; warning of penal provisions.*

[continued on page 58]

As may be seen, the regulations which have been promulgated under Section 242(d) of the Immigration and Nationality Act of 1952 closely follow the statutory language. Likewise, the orders of supervision pursuant to which the plaintiffs were released from custody on supervised parole substantially follow the language of the statute and the regulations, with the exception of certain restrictions with respect to plaintiffs' activities.[3] Although all of the plain-

[continued from page 57]

An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

3. The orders of supervision regulated and restricted the conduct and activity of each of the plaintiffs substantially as follows:

"THEREFORE, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitt-

[continued on page 59]

tiffs have been notified by the defendant of the conditions of their parole under Section 242(d), they have refused to sign the written orders of supervision, copies of which are attached to their respective complaints.

Since the time of the plaintiffs' release from the custody of the defendant on supervised parole, no action of any

---

[continued from page 58]

ing to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) on Thursday of each week, bet. 8:45 A.M. & 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

(5)(a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from 'associating' with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the

[continued on page 60]

kind with respect to any of the plaintiffs has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action.

Following the issuance of the orders of supervision, the plaintiffs commenced these actions in this Court, each respectively seeking a declaratory judgment and injunctive relief. The complaints ask that a declaratory judgment be made and entered declaring that Section 242(d) of the Immigration and Nationality Act of 1952, the regulations promulgated thereunder, and the orders of supervision issued against the plaintiffs, are all "unconstitutional, invalid, illegal, void and inoperative," and declaring that the particular provisions of the orders of supervision "are unreasonable and an abuse of discretion." The complaints further demand that an order be made and entered directing the defendant to set aside and cancel the orders of supervision, and that the defendant be enjoined from re-

---

[continued from page 59]

term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of 50 miles from Times Square, New York, N. Y. without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District."

The orders of supervision vary in certain unimportant respects, *e.g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted.

quiring the plaintiffs to obey the conditions of their supervised parole as contained in the orders of supervision.

The plaintiffs have moved, by means of orders to show cause issued at the same time the various complaints were filed, for temporary injunctions against the defendant pending the hearing and determination of the actions. In all cases, temporary restraining orders were issued by single judges of this Court, relieving plaintiffs from any obligation of compliance with the varying provisions of the orders of supervision, pending the hearing and determination of the plaintiffs' motions for temporary injunctions.

The defendant has cross-moved with respect to all fourteen complaints, asking the Court for an order (1) dismissing all of the complaints herein, pursuant to Rule 12(b) of the Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving the temporary restraining orders herein pursuant to Rule 65(b) of the Rules of Civil Procedure and Title 28, United States Code, Section 2284(3); and (3) appointing a three-judge Court, in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, to hear and determine the matters herein in issue.

The plaintiffs' attorneys offered no opposition to the defendant's application for the appointment of a three-judge Court, and, accordingly, on June 21, 1954, this statutory Court was designated in accordance with the appropriate provisions of Title 28, United States Code, Section 2284. All of these actions, including the various motions, were heard together on June 30, 1954, pursuant to orders of this Court, dated June 21, 1954, and June 23, 1954, respectively, and extensive arguments were made by counsel for both sides. On July 27, 1954, the temporary restraining orders referred to above were modified in certain similar respects by an order of this Court, and, as so modified,

E BLEED THRU

continue to be outstanding against the defendant in all the cases.

The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate;[4] and it has long been settled law that the constitutional powers of the federal courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do.

The District Director is a subordinate official who has no power to take any further action with respect to these plaintiffs beyond what he has already done. His authority ceased with the issuance of the orders of supervision and the release of plaintiffs from custody on supervised parole. Nor is it claimed or alleged in any of the complaints that the District Director has in any manner threatened to take further action against plaintiffs or any of them. Nowhere is it alleged that any of the plaintiffs has violated the terms of the statute under attack. A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine. Thus if they refuse to comply with the conditions of their parole, it is the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted. For aught that now appears there may be no actual prosecution of any of these plaintiffs, and the factual background indispensable to the determination of any such prosecution, should it take place, is in futuro and as yet non-existent.

The principle involved here is, in substance, the same as that reaffirmed by the Supreme Court in *United Public*

4. *Massachusetts* v. *Missouri*, 308 U. S. 1, 17 (1939); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272 (1941).

DARK PAG

Workers of America (C.I.O.) v. *Mitchell*, 330 U. S. 75 (1947). There, certain employees of the executive branch of the Federal Government and a union of such employees sued to enjoin the members of the Civil Service Commission from enforcing the provision of Section 9(a) of the Hatch Act which forbade such employees to take "any active part in political management or in political campaigns" and for a declaratory judgment holding the Act unconstitutional. In denying declaratory relief to all but one of the employees, on the ground that they had failed to present a justiciable controversy, the Court pointed out that these employees did not allege that they had violated the Act, or that the Commission had actually threatened to interfere with their rights, but only that they desired to engage in acts of political management and in political campaigns and understood that if they engaged in this activity the Commission would order their dismissal from federal employment. A consideration of these factors compelled the Court to conclude that these employees "seem[ed] clearly to seek advisory opinions" as to whether or not they could "act contrary to the rule against political activity." As to these employees, the Court stated (pp. 89-90):

> "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. * * * [T]he facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy.
>
> * * *

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The Court decided that one employee, Poole, was entitled to a declaratory judgment, as his suit presented a justiciable controversy. In so deciding, the Court pointed out that Poole admitted that he had violated the Act, that he had been charged by the Commission with political activity, and that a proposed order for his removal had been issued by the Commission subject to his right to reply to the charges and to present further evidence in refutation.

Here, the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for reasonable debate, as defendant is not now nor will he ever be charged with the duty of enforcing this criminal statute.

Accordingly, the complaints are dismissed, plaintiffs' motions denied, and the temporary restraining orders vacated.

Dated: October 11th, 1954.

HAROLD R. MEDINA
United States Circuit Judge

JOHN F. X. MCGOHEY
United States District Judge

EDWARD WEINFELD
United States District Judge

limited time after, by statute—the same statute—the power to detain to make "arrangements" for deportation, has ended.

These powers transcend the political power of the government to deport and to restrain or regulate as an "incident" to deportation. Since the conditions and restrictions which Section 1252(d) prescribes be placed upon an alien's liberty and property may, under the terms of Section 1252(d), be imposed without resort to "those indicia of legal procedure that are embedded in the constitution as the right of all men," they constitute an illegal and unconstitutional deprivation of the alien's liberty and property. The statute, in that it authorizes such deprivations, violates, on its face, the due process provision of the Fifth Amendment.

In *Wong Wing* v. *United States, supra*, this Court clearly determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and, constituted a violation of the Fifth Amendment. The Court struck down the "Geary Act" [Section 4, Act of May 5, 1892] as a transgression of the Fifth Amendment, for authorizing a year's imprisonment for Chinese aliens found, without judicial trials, to be in this country unlawfully. It held that Congress cannot "promote its policy in respect to Chinese persons by adding to its provisions for their expulsion and exclusion punishment by imprisonment at hard labour", inflicted without judicial trial. *Id.* at 235.

The rationale of the Court relating to the Geary Act is clearly applicable to Section 1252(d), which is its analogue. The Geary Act, in the view of the Court, without judicial trial, deprived Chinese aliens of liberty by authorizing their imprisonment for a year. Section 1252(d) similarly seeks, without judicial trial, to deprive aliens of liberty

and property by subjecting them to supervision which does and may further circumscribe their movements, restrict and impair their normal living and their right to work for an unlimited period of time—conceivably as long as they may live or until their departure from the United States can be effected. "Liberty" is not restricted in its import to freedom from imprisonment. This Court, in its recent decision, *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) ruled:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * * "

See also: *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897); *Bauer* v. *Acheson*, 106 F. S. 445, 450 (D. C. D. C. 1952).

That the power to deport does not, as well, include the right, without judicial trial, to restrict and impair freedom, liberty and property rights of aliens, although short of actual imprisonment, was sharply enunciated by Circuit Judge ANDERSON in *Petition of Brooks, supra.* The order of deportation against the alien in that case, concededly, could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge ANDERSON rejected this contention as unlawful and pointed out:

> "He is entitled to be deported or to have his freedom * * * any further detention by the Immigration authorities *or control of* [*the alien's*] *freedom is illegal.*" [at 235, 240] (Emphasis added.)

The conditions circumscribing and restricting the lives and livelihoods of the instant appellants, authorized by the

statute and imposed by the appellee, are such a "control of [their] freedom" as to render illega' both the statute, the regulation and the "Orders of Supervision" requiring the appellants to conform to the conditions.

Subjection to "supervision" is itself a "control of freedom" of far greater consequence than the control by bond in *Petition of Brooks, supra.* The statute here, moreover, requires and the "Orders of Supervision" direct the appellants to report to an officer of the Immigration and Naturalization Service, a restriction of freedom disapproved in *Petition of Brooks, supra.* The requirement that the appellants appear for medical or psychiatric examination is clearly of the same nature. The requirements of some of the appellants that they remain within a 50 mile radius of Times Square and remain residents of the Third Immigration District, unless with express permission of the appellee to be granted or withheld in his unrestricted discretion, are clearly deprivations of their liberty. In *Williams* v. *Fears, supra,* this Court declared:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the constitution." [at 274]

Accord: *Bauer* v. *Acheson, supra; Walker* v. *Chief Quarantine Officer,* 69 F. S. 980, 983 (D. C. D. Canal Zone Div. 1943).

The appellants are required to relinquish membership in the Communist Party—not in itself illegal; cease all support of, and all activities on behalf of all policies and doctrines of the Communist Party and its "affiliates"—whether legal or not; end their association with all members of the Communist Party or its affiliates, whether political in character, social or business, innocent or otherwise; to supply any and all information regardless of con-

stitutional or common law privilege. The right to be free of such restrictions is a right accorded to aliens, and is undeniable, even after "judicial trial," as an infringement of First Amendment rights.

The "supervision" authorized by the statute is of such a latitude that it may be employed to—and in fact has—affect or deprive the appellants of their jobs and livelihoods, a property right which is theirs under the Constitution. *See: Takahashi* v. *Fish Comm'n,* 334 U. S. 410 (1948) and cases cited therein.

The deprivation of the rights and liberties authorized by Section 1252(d) and accomplished here by the "Orders of Supervision", under circumstances where the exercise of the power to deprive no longer rests on the power to deport or powers incidental thereto, violates the Fifth Amendment, since the restrictions on liberty and property are imposed without due process of law, but by administrative fiat.

In *Carlson* v. *Landon, supra,* the approval of the exercise of discretion to detain, based on the statutory criterion that detention would serve to eliminate an arrested alien's "opportunity to hurt the United States," hinged on the incidental power to detain *pending determination of deportability,* an area within the plenary power of Congress to expel, apparently, under the *Carlson* case, without let or hindrance from the Fifth Amendment. The rationale of the *Carlson* case is inapplicable here. In the instant cases, the deportation proceedings are completely at an end, and deportation has become "patently impossible" for an unforseeable period of time. The Congress may not "promote its policy" to protect the United States from the alleged activities which allegedly render an alien undesirable, "by adding to its provision for their expulsion and exclusion" deprivations of life, liberty and property without judicial trial. *Wong Wing* v. *United States, supra.*

There exist still in the nation, for its protection, investigative agencies, criminal statutes, and "the speedy indictment and trial of actual crime in the courts." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 969. No other mode may be adopted consonant with constitutional due process.

III. Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth and Eighth Amendments to the United States Constitution.

(a) Section 1252(d) inflicts punishment without due process of law in violation of the Fifth Amendment.

In *Cummings* v. *Missouri*, 71 U. S. 277, 320 (1866), this Court established the proposition that:

> "The deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact. * * *"

The statute in question here permits the deprivation of, and the "Orders of Supervision" made against the appellants, deprive them of liberty, and rights—civil, political and property. In the circumstances under which these seemingly civil disabilities are authorized and were applied here, they constitute punishment. *See also*: *Ex parte Garland*, 71 U. S. 333 (1866); *Pierce* v. *Carskadon*, 83 U. S. 234 (1872); *Burgess* v. *Salmon*, 97 U. S. 381 (1878); *Harisiades* v. *Shaughnessy, supra*. The single "circumstance" that will render a civil disability a penalty or a punishment, is the absence of a reasonable relation to the power which the civil disability is intended to aid. *Cummings* v. *Missouri, supra* at 319-20.

Congress has, concededly, the plenary power to deport aliens it deems undesirable. As an incident to this power,

DARK PAGE

it may authorize the control or the restriction of an alien's liberty pending deportation and while arrangements are being made for the actual deportation, on criteria which it deems fit, including its evaluation of the effect of the alien's freedom upon the welfare of the nation. [*See*: *Carlson* v. *Landon, supra*]. The power to employ such a criterion, as a basis for detention or control, ends when the power to detain or control ends: with the termination of the proceeding to deport and at that time when "deportation becomes patently impossible." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 967; *Wong Wing* v. *United States, supra.*

The power to "supervise" granted by Section 1252(d) and the "supervisory" power exercised over these appellants, have no reasonable relation to the exercise of any of the powers which Congress may exercise or authorize over deportation and the deportable alien. It is possible to see, from an analysis of the "Orders of Supervision" this lack of relation, which displays, as the oath in the *Cummings* case, *supra,* the punitive purport of the "Orders":

> "It was required to reach the person, not the calling. It was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." [at 320]

That the statute was not intended to be directed at control of the alien pending the conclusion of deportation proceedings, is patent from the fact that Section 1252(d) does not become applicable until six months after the final conclusion of a deportation proceeding. It is likewise clear that it is not a temporary control while arrangements are

being made for deportation, for it is precisely the impossibility of effecting deportation within the prior six months that juvenates the power to supervise under Section 1252(d). And it comes into effect after that period during which the determination as to whether to control or not to control the liberty of the alien may be made on the basis of an evaluation that it is necessary for the welfare of the nation.

Nor can it be said that the statute or the "Orders of Supervision" are related to a power, perhaps inherent in the power to deport: to insure the capacity to deport and to avoid the frustration of that power. The disabilities imposed by the "Orders of Supervision" which most clearly indicate the punitive character of all of the disabilities, even those innocent on their face, appear in paragraphs 6 and 7 of the "Orders". [In some instances, the paragraph numbers are 5-a and 5-b.]

Paragraph 6 commands the appellants to terminate their membership in the Communist Party and its "affiliates" and their support and activity in behalf of the doctrines and policies of both. Paragraph 7 requires that the appellants refrain from any, or any type of association with members of the Communist Party and its "affiliates" or persons who support the doctrines or policies of either.

It is clear that mere membership in the Communist Party is not a crime. *See*: *Rogers* v. *United States*, 340 U. S. 367, 372, ftn. 12 (1951); 50 U. S. C. A. §783(f). It must, therefore, necessarily be so that other or different "associations" between Communists may be equally innocent. Nor has every policy or doctrine of the Communist Party been declared—even by the courts—to be unlawful [*United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2d, 1950)], nor in fact, may they be made so. *See*: *Jamison* v. *Texas*, 318 U. S. 413 (1943). Paragraph 6 and 7 of the "Orders of

DARK PAGE

Supervision" deprive the appellants of their rights to these legal associations, to income which accrues to some of them as a result of these legal associations, and punishes a breach of the inhibitions against those associations by criminal penalties. Of these paragraphs, propounded under the aegis of Section 1252(d), it may be truly said, as in the *Cummings* case: "* * * it was thought that the several acts deserved punishment, and * * * there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

The remaining paragraphs of the "Orders" establish, as a substitute for the jail to which these appellants may not be sent, a system of police surveillance over their lives that differs only in degree, but not in kind, from imprisonment, and is, in fact, in the nature of a house arrest. They are limited in their travel area and their unrestricted choice of residence. They must report in person. Subsection (3) of the statute and paragraph 2 of the "Orders", providing for physical and mental examination and sweeping unlimited interrogatories, subject the appellants, as Justice BLACK, for the majority, stated in *Hines* v. *Davidowitz*, 312 U. S. 52, 71 (1941): "to a system of indiscriminate questioning similar to the espionage systems existing in other lands." An innocent purpose is not to be attributed to these regulations. They are not needed here to insure the deportation of these appellants. The "Orders" require that the appellants appear for deportation, when it can be effected [Paragraph (1)]. Their whereabouts are constantly known to the government by virtue of their alien registration, pursuant to 8 U. S. C. A. §1302, and changes in their residence must also be made known, and have been. These appellants, heretofore, have met their legal obligations to appear at all times when they might have been legally summoned.

PAGE BLEED THRU

Section 1252(d) authorizes, and the "Orders" herein provide a substitute for prison and penalties. They are punishment. Inflicted without due process of law, and solely by administrative fiat, they are in violation of the Fifth Amendment.

(b) Section 1252(d) inflicts cruel and unusual punishment in violation of the Eighth Amendment.

The Eighth Amendment, by its terms, prohibits the infliction of "cruel and unusual punishments." It was conceived, along with the other protections of the Bill of Rights, as a stricture against tyrannical encroachment upon the democratic rights of the people. 2 Story, *Commentaries on the Constitution* (5th Ed., 1891), Sec. 1903; Whalen, *Punishment for Crime: The Supreme Court and the Constitution,* 35 Minn. L. Rev. 109, 111 (1951); 3 *Elliott's Debates* 447, 448. Its initial purport may have been adumbrated by the long course of its usual employment as a protection against inhuman, barbarous or torturous punishment, or the "wanton infliction of pain." See: *Louisiana* v. *Resweber,* 329 U. S. 459 (1947). Yet the force of its original conception has not been lost to this Court. In *Weems* v. *United States,* 217 U. S. 349, 372-3 (1910), it stated:

> "* * * Surely they [authors of the Amendment] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprison-

> ment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. *We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty', because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny*; of zeal for a purpose, either honest or sinister." (Emphasis added.)

In its most profound import, therefore, the Amendment's prohibitions are recognized to fall upon punishment whose imposition is designed to, or which tends to enforce, or which has the effect of enforcing, political conformity to the concepts of the sovereign. The kind, character and degree of punishment must be measured, case by case, against the yardstick of its power to bring about this illegitimate end. *See*: *Weems* v. *United States, supra; United States* v. *Ragen*, 54 F. Supp. 973 (D. C. N. D. Ill. E. D. 1944), *aff'd* 146 F. 2d 349, *cert. den.* 325 U. S. 865.

The controls on the appellants' liberty and property, authorized by Section 1252(d) and imposed by the "Orders of Supervision", constitute punishment. [*See*: *supra*, III (a)]. This punishment is of the kind whose "coercive cruelty" is such as to have the effect of enforcing political conformity and the abjuration of non-conformist, and, more particularly, Communist doctrines and policy, whether innocent or not. The punishment, quite obviously, is directed at the appellants as alleged Communists, and at their beliefs and activities. The disabilities which they

are made to suffer are extended, if not perpetual. They are prohibited from exercising their conceded constitutional rights to be and speak as Communists, if Communists they are. They are consigned to a life of police surveillance over body, mind and thought, and are put under virtual house arrest. If these oppressive conditions may be imposed on these aliens, others, to avert the catastrophe of living under the heel of an administrative Czar, may forego the privilege of holding the ideas or engaging in the activities which can bring about such a condition. This is precisely the type of punishment—"coercive cruelty"—the Eighth Amendment was designed to prevent, and does prohibit.

IV. Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

It has been the well-settled law since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantee of equal protection of the laws extends not only to citizens, but to aliens as well. In the recent case of *Takahashi* v. *Fish Comm'n*, *supra*, this Court expressed the extant law to be:

> "The Fourteenth Amendment and the laws adopted under its authority * * * embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [at 420]

It has been held that the due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations—concepts which are the core of the equal protection clause. See *Detroit Bank* v. *United States*, 317

U. S. 329 (1943); *Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Carleton Screw Products Co.* v. *Fleming,* 126 F. 2d 537 (C. C. A. 8th, 1942), *cert. den.* 317 U. S. 634; *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (Em. Ct. App., 1945), *cert. den.* 324 U. S. 865.

A fortiori, the Fifth Amendment, just as the Fourteenth, constitutes a protection for the alien from statutes which impose upon him, by reason of alienage alone, certain burdens. *Wong Wing* v. *United States, supra.* Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States, renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what non-citizens shall be permitted to remain within our borders." *Carlson* v. *Landon, supra* at 534. The power to detain, or, instead, to impose regulations on conduct to insure the deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon, supra* at 538. Where, as has already been demonstrated, the power to deport ceases or is rendered ineffectual, constitutional authority to exercise the powers over the alien, incidental to deportation, ceases. By the terms of Section 1252, the authority to detain, or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation. The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is legally resident in the United States, until such time as he can be deported, and a beneficiary of the rights guaranteed by the Constitution to all people within our borders.

Section 1252(d) seeks to impose upon the alien whose deportation cannot be effectuated within the six months period, a series of requirements and restrictions, unrelated to the deportation or effectuation of the deportation of the alien. The controls sought to be imposed by Section

1252(d) relate rather to control of the conduct deemed "undesirable." The regulations of conduct, activity or association authorized by the statute on its face and, more specifically as applied here, neither this law, nor any other, prescribes for a citizen.

There is little question that the character of conduct, activity and association included in the 17 categories of aliens legislatively declared undesirable [8 U. S. C. A. §1251] would be and is considered equally undesirable on the part of citizens. This is evidenced by the fact, certainly as to the conduct which it has been found rendered the appellants deportable, of the existence of penal statutes proscribing such conduct. *See*: *e.g.* 18 U. S. C. A. §2385; 50 U. S. C. A. §783.

The conduct, activity, or association rendering aliens "undesirable" and deportable, therefore, cannot reasonably set such aliens apart from citizens engaged in the same allegedly "undesirable" conduct, activity, or association, in terms of the control of such activities. No more harm results to the nation from one than the other. *See*: *Wong Wing* v. *United States, supra.* Both are subject to the same penal sanctions designed to safeguard the society and the nation. In *United States ex rel. Mezei* v. *Shaughnessy, supra,* the Court of Appeals for the Second Circuit stated:

> "* * * we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; the speedy indictment and trial of actual crime in the courts still obtain." [at 969]

The burdens imposed by Section 1252(d), on its face and as applied here, upon aliens, is, patently, by reason of alien-

DARK PAGE

age alone. Clearly then, the statute which authorizes the imposition of these regulations, the rules promulgated thereunder, and the "Orders of Supervision" issued in alleged pursuance thereof, deprive the appellants of the equal protection of the laws in violation of the Fifth Amendment.

V. Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(a) Section 1252(d) is an unlawful delegation of power.

Section 1252(d) commends "any alien" against whom a final administrative order of deportation has been outstanding for more than six months, to the supervision of the Attorney General under regulations prescribed by him.

For such a delegation of power to be constitutionally valid under Article 1, Section 1 of the Constitution, the statute must declare a guiding "policy", or establish a "rule", or an "intelligible principle", or such policy, rule or principle must be found in the "purpose of the act, its factual background and the statutory context in which they appear." *United States ex rel Knauff* v. *Shaughnessy,* 338 U. S. 537, 543 (1950); *Lichter* v. *United States,* 334 U. S. 742, 785 (1948); *American Power & Light Co.* v. *Securities & Exch. Comm'n,* 329 U. S. 90, 104-5 (1946); *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935).

The section itself establishes no policy or rule or principle to limit or guide the Attorney General in framing regulations which constitute his supervision of aliens. Although subsections (1), (2) and (3) of Section 1252(d) appear to direct, specifically, the character of certain supervisory

regulations, subsection (4), which requires an alien "to conform to such reasonable written restriction on his conduct and activity as are prescribed by the Attorney General," invests the Attorney General with an unlimited and undefined power, not only to regulate beyond the specific prescription of subsections (1), (2), and (3), but as to any other matter he may choose.

While it has been said that the Congressional purpose in deportation laws, at least as to alleged Communist aliens, in terms of securing their expulsion and protecting American society from such activity on their part pending deportation, provides an adequate statutory guide [*See*: *Carlson* v. *Landon, supra* at 543-4], it is clear from the terms and provisions of Section 1252(d) that this standard is obviously not intended to be the guide to the administrative discretion to be exercised under Section 1252(d).

Subsection (3), for instance, requires an alien to submit to interrogation, not only as to his "nationality, circumstances, habits, associations, and activities," but, as well, concerning "such other information, *whether or not related to the foregoing.*" (Emphasis added.) The delegation of power to demand information, thus unrelated, grants to the Attorney General a roving commission. No corner of an alien's mind, no idea, no belief, no thought, is free from administrative scrutiny. No business activity, political activity, or personal activity is free of the power to interrogate. No association, no matter how innocent, licit, or personal, is protected by the right to privacy.

It is difficult to understand, on the face of it, the relationship between the requirement that *any and every* deportable alien be required to subject himself, under subsection (2), to medical and psychiatric examination, and the eventual effectuation of his deportation or the protection of the community pending it. As to mental defec-

tives or prostitutes, perhaps a relationship exists. But why as to Communists? And how frequent an examination is needed to protect the community? Once a week? Every day? Twice a day? Must the alien be ill? Or may he be subjected to examination even if well? There is no guide provided in the statute to direct the Attorney General, or to prevent him from converting this subsection into an instrument of harassment or oppression.

In the instant case, under subsection (1), the appellants are required to appear personally, a condition, which, as to some creates a severe physical hardship, and as to all a serious interference with lawful, gainful occupations. Yet, under the terms of the subsection, the Attorney General may require daily reporting, which would render it impossible to retain any job. For the statute sets no standard for how much "identification" is necessary to insure the alien's deportation or to "protect" the community until the alien may be deported.

Subsection (4) is a *carte blanche.* The Attorney General, under it, may, without restriction, control the alien's life. Here, many of the "Orders of Supervision" limit travel to a 50 mile radius from Times Square. Under the statute, the Attorney General is as free to make it 10 miles, or to confine the alien to his own home and yard. Is the Communist less of a "menace" in the Times Square area than on the eastern shore of Maryland or on the Connecticut Sound? Or perhaps is there greater safety in some American-created Siberia?

Here some of the appellants are required to discontinue their membership in the Communist Party, although to do that, would mean the loss of their lawful jobs, their only source of income. If this may be accomplished thus indirectly, has the Attorney General not the power to order that they resign other lawful jobs or forfeit other financial benefits? And has he not as well the power to order them

to resign from the American Legion, the Catholic Church, the National Association for the Advancement of Colored People? He has ordered the appellants to cease their associations with other Communists, although some of them must continue such associations to maintain lawful occupations or would desire to continue such associations to extend lawful social relations, many of long standing. If this may be accomplished thus indirectly, is the appellee not free to order them to stop association with all other Americans, on the "germ" theory of the spread of Communism and thus place the appellants in virtual solitary confinement within their 50 mile circle?

By virtue of the delegation granted by Section 1252(d), to control the lives of and restrict the liberty of aliens—violation constituting a felony bearing criminal penalty—the Attorney General has been given a free hand. In fact, by virtue of the criminal penalty, he has been given power to legislate a series of crimes, for conduct or activity, which is not otherwise, and, in some instances, could not be made criminal.

The "Orders of Supervision" here were made in alleged pursuance of such an unlawful delegation of power. The "Orders" and the statute must, therefore, be declared invalid and void and in violation of Article 1, Section 1 of the United States Constitution.

(b) 8 C. F. R. §242.3(c) is an unlawful re-delegation of legislative power.

The unrestricted power granted by Section 1252(d) has been unrestrictedly re-delegated by the Attorney General, under 8 C. F. R. §242.3(c) to the "district director, district enforcement officer, or officer in charge, having administrative jurisdiction over the office in which the detention or release of [the] alien was authorized," although the statute placed the power in the Attorney General him-

self. Even in a situation in which no specific rule authorized such a delegation, Justice BLACK, dissenting in *Carlson* v. *Landon, supra,* questioned the constitutionality of such a delegation. He stated:

> "It is bad enough to read an Act as vesting even the Nation's chief prosecutor with power to determine what individuals he prosecutes should be held in jail without bail. Delegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions. I am not willing to imply that Congress has granted power to make such delegations which so ominously threaten the liberty of individuals." [at 554]

(c) The supervisory conditions imposed here are a usurpation of a legislative power.

It is well settled that: "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter,* 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Products Corp.,* 315 U. S. 475, 489 (1942).

(1) *As to Paragraphs 6 and 7 of the "Orders of Supervision"*

Section 4(f) of the Internal Security Act of 1950 [50 U. S. C. A. §783(f)] provides:

"Neither the holding of office nor membership in any Communist organization shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

Yet paragraphs 6 and 7 of the "Orders of Supervision" [in some instances 5-a and 5-b] proscribe membership in the Communist Party and its "affiliates". Violations of the proscriptions of paragraphs 6 and 7 become subject to the criminal penalties provided by Section 1252(d). The action of the appellee, therefore, in incorporating paragraphs 6 and 7 in the "Orders" "has the effect to subject * * * persons to fines and penalties under the act, that are excluded therefrom, by the terms of" the Internal Security Act of 1950.

Clearly this assumption of power by the administrative officer, contrary to the express policy and provision of Congress, is a usurpation of Congress' legislative function, in violation of Article 1, Section 1 of the Constitution.

(2) *As to paragraph 8 of the "Orders of Supervision"*

Paragraph 8 of the "Orders of Supervision" [in some instances 5-c] direct that the alien:

"* * * shall not violate sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Sec. 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

Section 2385 of the "Smith" Act provides that as the penalty for its violation, the convict:

"Shall be fined not more than $10,000 or imprisonment not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

DARK PAGE BL

The penalty section of Section 4 of the Internal Security Act provides:

> "Any person who violates any provision of this section, shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Clearly it was the design of Congress that *these* should be the penalties for violating either law. The inclusion of a further prohibition against their violation in the "Orders of Supervision"—an obvious redundancy in light of the existence of the statutes—has the effect, only, of increasing the penalties for their violation by applying to such violation the additional criminal penalties of Section 1252(d): namely, an additional year's imprisonment and fine of an additional $1,000.

Of such administrative action, this Court said in *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 404 (1944):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Wallace* v. *Cutten, supra*, [298 U. S. 229]."

Paragraph 8 is, therefore, manifestly a violation of Article 1, Section 1 of the United States Constitution.

BLEED THRU

VI. Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States.

A statute which, on its face and as applied, is so vague and indefinite, as to permit within its scope its administrators and enforcers, to burden, prohibit or make criminal, conduct and belief which are constitutionally permissible and protected, violates the Fifth Amendment and, as well, the constitutional provision protective of the exercise of such conduct or the holding of such belief. *Winters* v. *New York*, 333 U. S. 507 (1948); *Herndon* v. *Lowery*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

(a) As to Subsection (4).

Subsection (4) of Section 1252(d), in according to the Attorney General an undefined latitude to impose "written restrictions on [the alien's] conduct and activity," and in making criminal their violation, is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York, supra* at 509. An alien, whether deportable or not, while in residence here is entitled the guarantees of freedom of speech, press and association protected by the First Amendment. *Bridges* v. *Wixon, supra; see*: *Chew* v. *Colding, supra.*

The statute, as applied in the instant case by the "Orders of Supervision," does in fact create restrictions upon the conduct of the appellants which deprive them of First Amendment rights. The "Orders of Supervision" command each of the appellants, with minor deviations in some instances, to:

> "* * * terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Com-

DARK PAGE BLE

munist Political Association, the Communist Party of any state, or of any foreign state, or any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization."

"* * * refrain from associating with any person, knowing or having reasonable ground to believe that such a person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in [the above] Paragraph."

The mere statement of these blanket prohibitions is adequate to demonstrate that they are the type of ban that is prohibited by the First Amendment's guarantees of freedom of speech, press and assembly. *American Communications Association* v. *Douds, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931). The Communist Party has never been declared illegal, nor membership in it or association with it, *per se,* a crime. *See*: *Rogers* v. *United States,* 340 U. S. 367, 372 (1951). On the contrary, mere membership has been statutorily declared not to be a crime. [50 U. S. C. §783(f)]. Nor has every policy or doctrine attributed to the Communist Party been declared—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. *See*: *Jamison* v. *Texas,* 318 U. S. 413 (1943).

Furthermore, the language of the prohibitions referred to above is so vague and indefinite as to make it impossible for the appellants to ascertain what it is they must or may not do, under criminal penalty, in violation of their rights under the Fifth Amendment. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const. Co.,* 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921).

BLEED THRU

What is to be deemed "support" of doctrines and policies of the Communist Party? Does it mean public speech making? Or does it prohibit, as well, approval expressed over the dinner table to friends or neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed? Does it mean working, for pay, for such an organization, whether as a file clerk or as a director?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines and policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine or policy adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"?

What is to be deemed an "affiliate" of the Communist Party, from which the appellants must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Party, or of the Communist Parties of the various states, or political or geographical subdivisions of the states, or of the various foreign countries. *See*: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123

DARK PAGE BL

(1951). Will the appellee deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom shall the appellants refrain from associating? What is meant by "associating" under this paragraph? Does it mean "associating" in the Communist Party? Or does it mean that they shall not pass the time of day with a Communist on a street corner? Does it mean that, in the course of legitimate work, they may not speak to a Communist in connection with it? May they not invite Communists to their homes for a social Saturday evening? Must they forsake life-long friends who may be Communists?

What is "reasonable ground to believe" that a person is a Communist? Must the appellants become insurers of the political probity of each person that they meet? Is there a burden on the appellants to inquire of people if they are Communists? If the answer is: "No," are the appellants entitled to believe the answer, or must they investigate the truth of it? How are the appellants to know whether such a person is engaged in the "promotion of any of the activities" mentioned in the "Orders of Supervision" when it is all but impossible to ascertain what "activities" are referred to or what "affiliations"?

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the appellants must make such determinations at the risk of criminal indictment. As this Court recently said in *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what per-

BLEED THRU

sons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

By virtue of the undefined latitude of subsection (4) of Section 1252(d), the Attorney General, in the "Orders of Supervision," deprives the appellants of the liberty—without due process of law—to travel beyond a radius of 50 miles from Times Square. Such restrictions on freedom of movement have been held to be deprivations of liberty in violation of the Fifth Amendment. See: *Williams* v. *Fears, supra; Allgeyer* v. *Louisiana, supra; Bauer* v. *Acheson, supra.*

Similarly, the indefiniteness of subsection (4) has enabled the appellee to impose the condition, contained in paragraph 3-b of the "Orders of Supervision", that the appellants may not change their places of residence without the express permission of the Immigration Service, to be granted or withheld in its apparently unrestricted discretion. Not only does this condition constitute the same type of deprivation of liberty as the 50-mile travel restriction, but it has been and may, as well, be applied to frustrate a removal of residence designed by the appellants in aid of their employment, or to secure or better their livelihoods—property rights which accrue to them under the constitution. *See*: *Takahashi* v. *Fish Comm'n, supra.*

(b) As to Subsection (3).

Subsection (3) of Section 1252(d) authorizes the Attorney General to, and by paragraph 2 of the "Orders of Supervision" he requires the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, whether or not related to the foregoing as the Attorney General may deem fit and proper." Failure to comply with such a direction renders the alien subject to the criminal penalties of Section 1252(d).

DARK PAGE B

The courts have held that aliens are entitled, even in a pending deportation proceeding, to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment. *Schoeps* v. *Carmichael*, 177 F. 2d 391, 400 (C. A. 9th, 1949), *cert. den.* 339 U. S. 914; *United States ex rel Mezei* v. *Shaughnessy, supra* at 968. The language of the instant statute, on its face and as applied here, is broad enough to permit the interrogation on subject matters and compel responses, under threat of criminal penalty, concerning matters which may tend to incriminate the alien within the meaning of the Fifth Amendment. Such statutory compulsion renders a statute violative of the self-incrimination clause of the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Smith* v. *United States*, 337 U. S. 137 (1949). The language of 1252(d), which is so broad as to encompass such compulsion, renders Section 1252(d) void in violation of the Fifth Amendment. *Cf. Winters* v. *New York, supra.*

(c) As to Subsections (1) and (2).

Subsections (1) and (2) of Section 1252(d), requiring appearance for identification "from time to time" and for medical and psychiatric examination "when necessary" are so indefinite in their direction, as to permit the Attorney General to convert those requirements into means of depriving an alien of his liberty or property.

"From time to time," or "when necessary" is not a limitation, but an absence of limitation. The Attorney General is free to compel an alien to appear daily or twice or three times a day, making such appearances a virtual substitute for physical detention. This reporting may become so frequent as to make the strain of it a serious threat to the alien's health, or so time-consuming as to make it impossible for an alien to retain a job to support himself or his family. In the instant cases, it seriously affects both aspects of the appellants' lives.

E BLEED THRU

Such an undefined grant of power cannot be squared with the Fifth Amendment.

VII. The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power.

Section 1252(d) requires that the restrictions imposed by the Attorney General on the conduct or activity of the alien be "reasonable". Each of the appellants, in his complaint and affidavit in support of his motion for temporary relief, has set forth facts to establish that, as to each of them, the regulations of and restrictions upon his conduct are unreasonable and an abuse of power. It is submitted that, even assuming *arguendo* the constitutional validity of Section 1252(d) and the provisions of the "Orders of Supervision," the "Orders," being unreasonable, are illegal and should not be enforced.

CONCLUSION

Plenary consideration of this appeal should be afforded to the appellants and the decision of the court below reversed.

Respectfully submitted,

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Appellants.

DARK PAGE E

APPENDIX

Opinion of Statutory Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285, 93-286, 93-287, 93-288, 93-289, 93-290, 93-291, 93-292, 93-293, 93-294, 93-228

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Civ. No. 87-98, 87-99, 87-124

BETTY GANNET, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Before: MEDINA, Circuit Judge, and
McGOHEY and WEINFELD, District Judges.

BLEED THRU

Opinion of Statutory Court

BLANCH FREEDMAN & GLORIA AGRIN, Attorneys for Plaintiffs.

J. EDWARD LUMBARD, United States Attorney, Attorney for Defendant; HAROLD R. TYLER, JR., HAROLD J. RABY, Assistant United States Attorneys and LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service, of Counsel.

MEDINA, Circuit Judge:

The pleadings and issues in the fourteen actions before us are substantially the same. Each of the plaintiffs is an alien who has been ordered deported from the United States after appropriate administrative proceedings which none has sought to review by any judicial proceeding. The order of deportation in each case was based on an administrative finding that, after entering the United States, the plaintiff had been a member of the Communist Party of the United States. Final orders and warrants for the deportation of each of the plaintiffs have been outstanding for more than six months.

Three of the plaintiffs, namely, Gannet, Bittleman and Jones, have not been deported primarily because they were tried and convicted of violations of the penal provisions of the Smith Act for conspiring to advocate the overthrow of the United States Government by force and violence. These plaintiffs have been sentenced to various terms of imprisonment and are now at liberty on judicial bond pending their appeals in the criminal action. With respect to the other eleven plaintiffs, they have not been deported by reason of the inability of the immigration authorities physically to effectuate deportation. Some of the plaintiffs are so-called "stateless persons"; others have been denied, temporarily at least, readmittance to the countries of their nativity or last residence prior to coming to the United States.

DARK PAGE BL

Since more than six months have elapsed from the entry of the final orders of deportation, the defendant has released the plaintiffs from custody on supervised parole in accordance with the express provisions of Section 242(d) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252(d),[1] and the regulations promulgated thereunder, 8 C. F. R. §242.3(c),[2] the constitutionality of which plaintiffs now seek to attack.

---

1. Section 242(d) of the Immigration and Nationality Act of 1942, 8 U. S. C. §1252(d), provides as follows:

"(d) *Supervision of deportable alien; violation by alien.*

Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

2. 8 C. F. R. §242.3(c) provides as follows:

"(c) *Release; supervision after six months' period has expired; warning of penal provisions.*

[continued on page 58]

As may be seen, the regulations which have been promulgated under Section 242(d) of the Immigration and Nationality Act of 1952 closely follow the statutory language. Likewise, the orders of supervision pursuant to which the plaintiffs were released from custody on supervised parole substantially follow the language of the statute and the regulations, with the exception of certain restrictions with respect to plaintiffs' activities.[3] Although all of the plain-

[continued from page 57]

An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

3. The orders of supervision regulated and restricted the conduct and activity of each of the plaintiffs substantially as follows:

"THEREFORE, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitt-

[continued on page 59]

DARK PAGE BLE

tiffs have been notified by the defendant of the conditions of their parole under Section 242(d), they have refused to sign the written orders of supervision, copies of which are attached to their respective complaints.

Since the time of the plaintiffs' release from the custody of the defendant on supervised parole, no action of any

[continued from page 58]

ing to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) on Thursday of each week, bet. 8:45 A.M. & 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

(5)(a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from 'associating' with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the

[continued on page 60]

BLEED THRU

kind with respect to any of the plaintiffs has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action.

Following the issuance of the orders of supervision, the plaintiffs commenced these actions in this Court, each respectively seeking a declaratory judgment and injunctive relief. The complaints ask that a declaratory judgment be made and entered declaring that Section 242(d) of the Immigration and Nationality Act of 1952, the regulations promulgated thereunder, and the orders of supervision issued against the plaintiffs, are all "unconstitutional, invalid, illegal, void and inoperative," and declaring that the particular provisions of the orders of supervision "are unreasonable and an abuse of discretion." The complaints further demand that an order be made and entered directing the defendant to set aside and cancel the orders of supervision, and that the defendant be enjoined from re-

---

[continued from page 59]

term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of 50 miles from Times Square, New York, N. Y. without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District."

The orders of supervision vary in certain unimportant respects, *e.g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted.

DARK PAGE

quiring the plaintiffs to obey the conditions of their supervised parole as contained in the orders of supervision.

The plaintiffs have moved, by means of orders to show cause issued at the same time the various complaints were filed, for temporary injunctions against the defendant pending the hearing and determination of the actions. In all cases, temporary restraining orders were issued by single judges of this Court, relieving plaintiffs from any obligation of compliance with the varying provisions of the orders of supervision, pending the hearing and determination of the plaintiffs' motions for temporary injunctions.

The defendant has cross-moved with respect to all fourteen complaints, asking the Court for an order (1) dismissing all of the complaints herein, pursuant to Rule 12(b) of the Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving the temporary restraining orders herein pursuant to Rule 65(b) of the Rules of Civil Procedure and Title 28, United States Code, Section 2284(3); and (3) appointing a three-judge Court, in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, to hear and determine the matters herein in issue.

The plaintiffs' attorneys offered no opposition to the defendant's application for the appointment of a three-judge Court, and, accordingly, on June 21, 1954, this statutory Court was designated in accordance with the appropriate provisions of Title 28, United States Code, Section 2284. All of these actions, including the various motions, were heard together on June 30, 1954, pursuant to orders of this Court, dated June 21, 1954, and June 23, 1954, respectively, and extensive arguments were made by counsel for both sides. On July 27, 1954, the temporary restraining orders referred to above were modified in certain similar respects by an order of this Court, and, as so modified,

E BLEED THRU

continue to be outstanding against the defendant in all the cases.

The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate;[4] and it has long been settled law that the constitutional powers of the federal courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do.

The District Director is a subordinate official who has no power to take any further action with respect to these plaintiffs beyond what he has already done. His authority ceased with the issuance of the orders of supervision and the release of plaintiffs from custody on supervised parole. Nor is it claimed or alleged in any of the complaints that the District Director has in any manner threatened to take further action against plaintiffs or any of them. Nowhere is it alleged that any of the plaintiffs has violated the terms of the statute under attack. A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine. Thus if they refuse to comply with the conditions of their parole, it is the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted. For aught that now appears there may be no actual prosecution of any of these plaintiffs, and the factual background indispensable to the determination of any such prosecution, should it take place, is in futuro and as yet non-existent.

The principle involved here is, in substance, the same as that reaffirmed by the Supreme Court in *United Public*

4. *Massachusetts* v. *Missouri*, 308 U. S. 1, 17 (1939); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272 (1941).

DARK PAGE B

Workers of America (C.I.O.) v. *Mitchell*, 330 U. S. 75 (1947). There, certain employees of the executive branch of the Federal Government and a union of such employees sued to enjoin the members of the Civil Service Commission from enforcing the provision of Section 9(a) of the Hatch Act which forbade such employees to take "any active part in political management or in political campaigns" and for a declaratory judgment holding the Act unconstitutional. In denying declaratory relief to all but one of the employees, on the ground that they had failed to present a justiciable controversy, the Court pointed out that these employees did not allege that they had violated the Act, or that the Commission had actually threatened to interfere with their rights, but only that they desired to engage in acts of political management and in political campaigns and understood that if they engaged in this activity the Commission would order their dismissal from federal employment. A consideration of these factors compelled the Court to conclude that these employees "seem[ed] clearly to seek advisory opinions" as to whether or not they could "act contrary to the rule against political activity." As to these employees, the Court stated (pp. 89-90):

> "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. * * * [T]he facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy.
>
> • • •

BLEED THRU

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The Court decided that one employee, Poole, was entitled to a declaratory judgment, as his suit presented a justiciable controversy. In so deciding, the Court pointed out that Poole admitted that he had violated the Act, that he had been charged by the Commission with political activity, and that a proposed order for his removal had been issued by the Commission subject to his right to reply to the charges and to present further evidence in refutation.

Here, the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for reasonable debate, as defendant is not now nor will he ever be charged with the duty of enforcing this criminal statute.

Accordingly, the complaints are dismissed, plaintiffs' motions denied, and the temporary restraining orders vacated.

Dated: October 11th, 1954.

HAROLD R. MEDINA
United States Circuit Judge

JOHN F. X. MCGOHEY
United States District Judge

EDWARD WEINFELD
United States District Judge

INDEX

	Page
Statement	2
Argument	5
Conclusion	17

CITATIONS

Cases:

Carlson v. *Landon*, 342 U.S. 524	9, 10, 11
Cox v. *United States*, 332 U.S. 442	12
Eccles v. *People's Bank*, 333 U.S. 426	7, 16
Flynn et al. v. *United States*, No. 442, this Term, certiorari denied, January 10, 1955	2
Galvan v. *Press*, 347 U.S. 422	13, 15
International Longshoremen's and Warehouse Union v. *Boyd*, 347 U.S. 222	5, 6
United Public Workers v. *Mitchell*, 330 U.S. 75	5, 6
United States v. *Spector*, 343 U.S. 169	12
Wong Wing v. *United States*, 163 U.S. 228	10, 13

Constitution, Statutes and Regulation:

Constitution, Art. III, Sec. 2	8
Administrative Procedure Act, Sec. 10 (60 Stat. 237, c. 324, Sec. 5 U.S.C. 1009)	7
Immigration and Nationality Act of 1952, 66 Stat. 163:	
Section 242(d) (8 U.S.C. 1252(d))	2, 11
Sections 262-266 (8 U.S.C. 1302-1306)	14
United States Code:	
Section 2282	2
Section 2284	2
8 C.F.R. 242.3	3

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 549

MICHAEL NUKK, ET AL., PLAINTIFFS-APPELLANTS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of this Court, moves that the order of the district court be affirmed, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This is a direct appeal from an order entered on October 11, 1954, and a judgment thereon entered

PAGE BLEED THRU

on December 1, 1954, by a district court of three judges, specially constituted pursuant to 28 U. S. C. 2282 and 2284, dismissing appellants' complaints seeking judgments to declare unconstitutional and invalid Section 242(d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 209 (8 U. S. C. 1252(d)), together with the regulations and orders of supervision issued under the section; to declare the orders of supervision of deportable aliens to be unreasonable and an abuse of power; and to grant injunctive relief against appellee.

STATEMENT

Appellants are all aliens who have been ordered deported because of their membership in the Communist Party. The deportations have not been effected, for a number of reasons. Three of appellants (Gannett, Bittleman, Jones) have been convicted of violations of the Smith Act and this Court has recently denied certiorari to review these convictions. *Flynn et al.* v. *United States,* No. 442, this Term, certiorari denied, January 10, 1955.[1] As to the others, no country has been found which will admit them. Since six months have elapsed subsequent to the final order of deportation, section 242(d) of the Immigration and Nationality Act of 1952 is applicable (8 U. S. C. 1252(d)):

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding

[1] After denial of certiorari, bail was revoked as to these appellants and they are now in prison. As to them, the instant cause appears to be moot.

SPOTS ON PAGES DARK PAGE B

for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

Pursuant to this statute, and regulation 8 C. F. R. 242.3, which follows the statute, each appellant was served with an order of supervision. These orders,

EED THRU

with minor variations, require each alien to report once each week (subsequently administratively modified to require reporting once each month) to the officer in charge of the Immigration and Naturalization Service in the district; to notify the officer in charge of any change in residence or employment within the district within 48 hours after the change; to apply for permission to change the place of residence from one immigration district to another; in some cases to refrain from traveling outside a radius of 50 miles from Times Square, New York, without written permission; and to report when requested for medical and psychiatric examination and to furnish information. In addition, the alien is required to terminate and remain disassociated from membership in, or support of, any activity in furtherance of the doctrines and policies of the Communist Party or any branch, affiliate, or subdivision thereof, and to refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with the Party. See Juris. Statement App. 4a-6a. Associating is expressly stated not to apply to members of the alien's family or professional legal counsel if such associations are not used in the furtherance of the doctrines, policies, or activities of the organization.

The respective affidavits of appellants, filed in support of their complaints, recite instances of personal inconvenience and loss of time, and, in some cases, allege that change of employment will be

DARK PAGE BLEE

caused by the reporting requirements and restrictions on travel. The affidavits do not contain any allegations that appellants made requests for administrative relief with respect to the specific difficulties alleged and they do not disclose the factual basis of the denial, if any, of any request for modification, if any such relief was pursued within the administrative process.

The three-judge court dismissed the complaints on the ground that there was no justiciable controversy between the parties. The court pointed out that appellants had not violated the statute, and that the appellee, the District Director, had neither the power to proceed against appellants for a violation nor had he or anyone else threatened to do so. The court relied upon the refusal of this Court, in *United Public Workers* v. *Mitchell*, 330 U. S. 75, to grant "advisory opinions upon broad claims of rights" (330 U. S. at 89).

ARGUMENT

The questions raised by appellants, not only in challenging the holding of the court below that no actual case or controversy had yet been reached (Juris. Statement 11-19), but also in attacking the statute on its merits (Juris. Statement 20-54), are so unsubstantial as not to need further argument.

1. Whatever questions may have existed before the decisions of this Court in *United Public Workers* v. *Mitchell*, 330 U. S. 75, and *International Long-*

FED THRU

shoremen's and Warehouse Union v. *Boyd*, 347 U. S. 222, it has now been decided that when a statute imposes restrictions or consequences upon specified conduct, no actual case or controversy sufficient to invoke a judicial test can be built upon a mere desire to act contrary to the restrictions in the future, or on the argument that the restrictions are potentially or hypothetically burdensome and invalid. There must be the actual posing of a controversy in its full and final factual detail, beyond material changes or refinements of position by either party which could well moot the conflict or render judicial intervention unnecessary.

In *United Public Workers* v. *Mitchell, supra*, federal employee citizens alleged that they were being restricted by the Hatch Act as to the basic and well-understood activity of political participation, and a test by violation, if unsuccessful, would have been no less ruinous than such a test in the instant case. In *International Longshoremen's and Warehouse Union* v. *Boyd, supra*, the aliens asserted that they would be subjected to the grave practical consequences of being considered re-entrants if they continued the formerly innocuous activity of working in Alaska in summer. In neither of these cases was there as much question concerning the actual detail of what specific activity was in controversy as there is in the instant case, where the restrictions most complained of by appellants are subject to administrative interpretation and modification (*e.g.*, travel beyond specified limits), and where the record does not show any real effort

DARK PAGE BL

to exhaust the simple administrative remedy of asking modification or clarification where needed.

It is of course true that there can be no relinquishment of the general right to supervise under the statute, and that certain general terms of supervision, such as the duty to report from time to time and to refrain from activities in support of the Communist Party, will not be abrogated. But any real question as to what is prohibited, as distinguished from the extreme hypothetical situations repeatedly posed by appellants, is subject to clarification in the context of specific facts and cannot properly be judged at this time on the basis of facile generalities. *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432, 435. The decisions of this Court make it clear that the judicial branch of the Government is not to provide an advance advisory service as to whether persons shall or shall not obey the enactments of the legislative branch, particularly where there may never be an occasion to disobey. The courts have constitutional authority only to protect persons actually and immediately affected by the penalties of invalid legislation. No sanctions have been set in motion against appellants, nor is it even alleged that sanctions have been threatened. From all aspects, their claims are premature.

2. Even if, as appellants argue (Juris. Statement 11-25), there is a right of review at this time under the Administrative Procedure Act (60 Stat. 237, 243, c. 324, Sec. 10; 5 U.S.C. 1009) or otherwise, it is clear that such review could relate only to the basic general issue of whether there can be *any* super-

BLEED THRU

vision at all of aliens found deportable but whose deportation has not been effectuated within six months after issuance of the final order. The Procedure Act is expressly inapplicable to "agency action * * * committed to agency discretion" and therefore would not authorize review of the details of supervision committed to the discretion of the agency. Moreover, no statute should be read as attempting to grant jurisdiction in contravention of the constitutional limitation of jurisdiction (Const., Art. III, Sec. 2) to cases and controversies. And, as discussed above, the detailed effect of the supervision orders has clearly not reached the degree of concreteness which would ground a true case or controversy as to those details. Particularly is this so in light of the fact that appellee has no powers of enforcement and that any violation of the statute must be proved to be "willful".

Since, therefore, even if a controversy should be deemed to exist, the only question which could be open at this time would be the general right of supervision, the order of the district court dismissing the complaints may properly be affirmed summarily. There can be no serious question of the power of Congress to require some supervision of the aliens here involved. These are aliens who have been found to be subject to expulsion. They are here only because it has not proved possible to deport them. Thus, although theoretically they should no longer be here, Congress had to face the practical situation that many of them will actually be here for considerable periods of time. Congress

DARK PAGE BLEED

has developed a reasonable and practical solution for this practical problem. It has decreed that the aliens shall not be kept in detention indefinitely but shall be subject to such supervision as will tend to insure their deportability when that can be effected and also to prevent the freedom thus granted from being used to the detriment of the internal security of the United States. In *Carlson* v. *Landon,* 342 U. S. 524, this Court held that Congress had power to authorize actual detention of aliens not yet determined to be deportable, and that, in exercising the power so conferred, the Attorney General could properly consider the danger that such aliens would engage in activities detrimental to the United States. An alien does not become less dangerous to the United States when he has finally been ordered deported and definitely knows that the United States no longer wants him.

Appellants' whole argument ignores this central fact that they are in a very special class whose distinct status merits special treatment. They are not aliens whom the United States has accepted as part of the general population; they are a group of aliens who have, after full hearings, been found to be undesirable residents of the United States who should be removed but who remain here only because it has proved impossible to deport them. The restrictions are imposed not because appellants are aliens (Juris. Statement 38-41), but because they are aliens found to be deportable. Appellants speak as if the requirement of deportation, because currently impeded, is to be deemed concluded, and

ED THRU

as if the possibility of deportees disappearing into the general population unless carefully checked was unheard of, especially in the case of members of the Communist Party. The special status of appellants as deportable aliens who have not yet been deported manifestly justifies some form of special treatment. And the treatment specified by Congress, which is not full detention but is not yet full and absolute freedom, is clearly reasonable. Supervision which is in many ways less burdensome than that normally imposed on members of the armed forces cannot be equated to the imprisonment and hard labor provision of *Wong Wing* v. *United States*, 163 U. S. 228. It does not become "punishment" merely because appellants choose to call it such (see Juris. Statement 32-38).[2] It remains supervision, akin not only to parole, probation, or bail, but also to the requirements imposed by many civilized countries on all aliens in their midst.

The *Carlson* case (342 U. S. at pp. 542-544) is a complete answer to appellants' contention that the statute on its face is unconstitutionally vague and indefinite and an unlawful delegation of legislative power (Juris. Statement 41-54). As this Court there said, at p. 542, "It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections." Considering the lim-

---

[2] Typical of appellants' exaggeration which results in a false posing of issues is their characterization of the requirement that they not travel beyond fifty miles without permission as "house arrest" (Juris. Statement 35).

DARK PAGE BLEE

ited class of aliens to which Section 242(d) applies, the standards and limitations of the supervisory power are clear. The supervisory regulations must relate to the self-evident dual purpose of the legislation: (i) to assure that the aliens under order of deportation are promptly available for the carrying out of the deportation orders as soon as that becomes possible, and (ii) to prevent the aliens, whose lack of any remaining stake in the United States differentiates them from citizens and from other alien residents, from using their freedom to the detriment of the United States. As the *Carlson* case points out, 342 U. S. at 542:

> Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose. Congress need not make specific standards for each subsidiary executive action in carrying out a policy.

Like the bail provision in the *Carlson* case, the supervisory provision here applies to several classes of aliens. Some may be dangerous to the United States because they have shown criminal tendencies. The group represented by appellants, like the *Carlson* group, is dangerous because of activities in support of an organization which has been found to threaten the internal security of the United States. As in the *Carlson* case (at p. 543), a "wide range of discretion in the Attorney General" is required "to meet the varying situations" which may arise, but

EED THRU

the purpose and policy of the regulation is nevertheless clear.

Equally without merit is appellants' argument that the statute is invalid because it attaches consequences to acts of persons in a status (*i. e.* deportability) which was established in an administrative proceeding. (Juris. Statement 20-32.) The law is replete with instances in which a status is established administratively. Such legislation is not invalid *ab initio* merely because certain crimes peculiarly associated with that status may later rest indirectly upon the administrative determination. The selective service legislation, for example, is not to be invalidated merely because the thousands of draft classifications are not first established by jury trial, although a later refusal to comply with requirements of the classification may result in criminal prosecution. See *Cox* v. *United States,* 332 U. S. 442, 453-455.[3] Appellants do not contest the validity of the deportation orders, review of which they could have sought while they were held in custody. We do not even have here the problem, which the dissenting opinion in *United States* v. *Spector,* 343 U. S. 169, 174-180, raises, of whether, in a criminal prosecution for violation of the conditions of supervision, appellants would have an additional right to contest the validity of the deportation order. The only issue is whether, on the basis of the finding of deportability, appellants can be subject to reasonable regu-

[3] Compare, also, price control and public utility legislation and many forms of licensing.

lation based upon the status of deportability. Clearly they can, just as a draft registrant classified 1-A can be ordered to report for induction.

The error in appellants' reasoning rests on a misinterpretation of the decision in *Wong Wing* v. *United States*, 163 U. S. 228, on which they rely so heavily. The *Wong Wing* case did not relate to a statute prescribing precautionary and regulatory restrictions with respect to deportees, but to one which made the mere entry of an order of unlawful residence an automatic and immediate imposition of imprisonment "and infamous punishment at hard labor" (163 U. S. at 235). There is a clear and fundamental difference between an administrative finding automatically imposing punishment, and a group of provisions, as in the instant case, imposing reasonable regulations and providing for imprisonment only if there is a judgment in a criminal trial that such regulations have been willfully violated.[4]

3. While, for the reasons set forth above, we believe that the specific details of the orders of supervision are not now open for determination, it should be noted that once the power to supervise is established there can be no substantial question of

---

[4] Similarly, the argument that "a bill of attainder and ex post facto law" is involved (Juris. Statement, 22-25), completely overlooks the fact that no punishment for past acts is here enacted, but only for future violations, if any, of the regulatory provisions. To the extent that appellants base their argument on the fact that deportability has been found because of membership in the Communist Party, they are merely attempting to reargue issues determined against them in *Galvan* v. *Press*, 347 U.S. 522.

BLEED THRU

the reasonableness of the requirements specified in the orders directed to appellants.

It is manifestly reasonable to require some reporting by aliens subject to supervision, particularly since they would have a motive to endeavor to conceal their identity and fade into the general population. The requirement for reporting once each week has been changed to once each month, and, with the closing of Ellis Island, the reporting is to the central location of the District Headquarters of the Immigration and Naturalization Service, at 70 Columbus Avenue in the heart of New York. As to the requirements that the alien notify of his change of residence in the district and that he obtain permission before changing to another district, the justification for such requirements as a method of keeping informed is self-evident. Cf. the general provisions requiring registration of aliens (Immigration and Nationality Act of 1952, Secs. 262-266, 8 U. S. C. 1302-1306). There is not and can be no allegation that permission to change has been or will be arbitrarily denied. The requirement that permission be obtained to travel outside of a radius of fifty miles is merely another precaution designed to assure that the alien remains identified and subject to supervision by the office with the duty to supervise. Appellants do not assert that reasonable applications have been denied or will be denied in the future. In fact, in an affidavit by an attorney for the Immigration Service filed in the district court on appellants' application for a stay, it was stated that one of the appellants made application

for leave to travel to a distant resort for health purposes and the application was immediately granted.

Similarly, since the right to supervise must exist, it is reasonable to require the persons subject to supervision to answer questions which will tend to show whether the various provisions are being obeyed. Appellants assert that the questioning may go far afield, but that speculative assertion clearly raises issues which were not before the court below and are not before this Court on this appeal. The order of supervision merely refers to the furnishing of "such information as may be deemed fit and proper". The possibility that some irrelevant questions may be asked does not show that there should not be any right to ask questions at all.

As to the requirement that appellants disassociate themselves from the Communist Party and its activities, the answer is plain; if an alien may be expelled for membership in the party (see *Galvan* v. *Press*, 347 U. S. 522), it is reasonable to provide that those whom it has proved impossible to expel should be prevented from using that circumstance to carry on the very activities which have caused Congress to order their expulsion. Appellants argue that in some cases this condition means loss of their former and more advantageous means of livelihood since they are employed by the Communist Party. But appellants could not have continued in their positions if they had been deported in accordance with law. In accommodating the theory of deportation to the practical difficulties

BLEED THRU

presented by the present world situation, Congress cannot be required to assure an alien ordered deported of permission to live here on exactly the same terms as he did before the order of expulsion, when his previous way of life involved activities found to be detrimental to the United States which supply the reason for his expulsion.

The ban on associations with Communists is of the same character, *i. e.*, to assure that the freedom occasioned by the difficulties in carrying out deportation will not be used to the detriment of the United States. Association is expressly defined as *not* including association with family and legal counsel. Again, appellants conjure up possibilities of interpretation which are not presented by the broadside attack on the whole theory of supervision presented by the instant complaints. The reasonableness of any particular interpretation can be dealt with as it arises (cf. *Eccles* v. *People's Bank,* 333 U. S. 426, 432-435), and in this connection it should be reiterated that the statute requires that violations of the provisions must be willful to be criminal. Appellants do not show present injury by conjuring up possibilities of some difficulty that does not now exist and may never occur. All the general conditions of supervision are reasonable and valid in themselves.

In short, even if the restrictions are judged in their present form, without allowance for the obvious further possibility of administrative remedy in amelioration of various provisions, there is no present part of the statute, regulations, or orders

which fails to bear a sufficient, reasonable, and lawful relation to the powers and duties of the Congress and the executive branch, as well as to the necessities intrinsic in the case of aliens awaiting deportation and the particular problem raised by aliens such as appellants in relation to national security and subversion.

CONCLUSION

It is therefore respectfully submitted that, since no actual case or controversy has been presented and since even the theoretical arguments pose no sufficiently substantial question, the judgment of the court below should be affirmed without further briefs or argument.

SIMON E. SOBELOFF,
Solicitor General.

JANUARY, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 329440 929

Office - Supreme Court
FILED
SEP 12 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

APPELLANTS' BRIEF

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Plaintiffs-Appellants,
220 Broadway,
New York City.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050

GE BLEED THRU

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	9
POINT I—A case and controversy exists between the parties to the actions herein	11
POINT II—Section 1252(d), on its face, deprives appellants of procedural due process in violation of the Fifth Amendment and, as applied, violates Article 1, Section 9 of the United States Constitution	20
(a) Section 1252(d), on its face, violates the due process clause of the Fifth Amendment	20
(b) Section 1252(d), as applied, is a bill of attainder and ex post facto law	23
POINT III—Section 1252(d), on its face and as applied, deprives appellants of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution	24
POINT IV—Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth Amendment to the United States Constitution	31
POINT V—Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution	34

PAGE

POINT VI—Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution 37

(a) Section 1252(d) is an unlawful delegation of power 37

(b) The supervisory conditions imposed here are a usurpation of a legislative power 40

POINT VII—Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States 43

(a) As to Subsection (4) 43

(b) As to Subsection (3) 46

(c) As to Subsections (1) and (2) 47

POINT VIII—The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power 47

CONCLUSION 48

Cases Cited

Allgeyer v. Louisiana, 165 U. S. 578 (1897) 28, 45

Alvater v. Freeman, 319 U. S. 359 (1943) 18fn

American Communications Association v. Douds, 339 U. S. 382 (1950) 44

American Power & Light Co. v. Securities & Exch. Comm'n, 329 U. S. 90 (1946) 37

Bauer v. Acheson, 106 F. Supp. 445 (D. C. D. C. 1952) 28, 29, 45

Bolling v. Sharpe, 347 U. S. 497 (1954) 28

DARK PAGE

PAGE

Bridges v. Wixon, 326 U. S. 135 (1945).....25, 43

Brooks, Petition of, 5 F. 2d 238 (D. C. D. Mass., 1925) 25, 26, 28, 29

Burgess v. Salmon, 97 U. S. 381 (1878)..... 31

Carleton Screw Products Co. v. Fleming, 126 F. 2d 537 (C. C. A. 8th, 1942), cert. den. 317 U. S. 634..... 35

Carlson v. Landon, 342 U. S. 524 (1952).....23, 25, 30, 31, 32, 35, 38

Chew v. Colding, 344 U. S. 590 (1953)..... 25

City Bank v. Schnader, 291 U. S. 24 (1934)..... 19fn

Columbia Broadcasting System v. United States, 316 U. S. 407 (1942).....15, 17, 18

Connally v. General Const. Co., 269 U. S. 385 (1926).. 44

Connecticut Mutual Life Ins. Co. v. Moore, 333 U. S. 541 (1948).....17fn, 18fn

Cummings v. Missouri, 71 U. S. 277 (1866).....31, 32, 33

Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207 (1903)..... 18fn

Detroit Bank v. United States, 317 U. S. 329 (1943).. 35

Dobbins v. Los Angeles, 195 U. S. 223 (1904)..... 18fn

Eccles v. Peoples' Bank of Lakewood Village, 333 U. S. 426 (1948)..... 13fn

Federal Power Commission v. Pacific Power & Light Co., 307 U. S. 156 (1939).....13fn, 14fn

Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1930).....13fn, 14fn

Federal Radio Comm'n v. Nelson Bros. Co., 289 U. S. 266 (1933)..... 13fn

Fong Yue Ting v. United States, 149 U. S. 698 (1893) 13fn

GE BLEED THRU

PAGE

Galvan v. Press, 347 U. S. 522 (1954) 23

Garland, Ex parte, 71 U. S. 333 (1866) 31

Gibbs v. Buck, 307 U. S. 66 (1939) 19fn

Gunter v. Atlantic Coast Line, 200 U. S. 273 (1906) .. 11

Harisiades v. Shaughnessy, 342 U. S. 580 (1952) ..23, 24, 31

Herndon v. Lowery, 301 U. S. 242 (1937) 43

Hill v. Florida, 325 U. S. 538 (1945) 18fn

Hines v. Davidowitz, 312 U. S. 52 (1941) 34

Hirabayashi v. United States, 320 U. S. 81 (1943) 35

Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925) 19fn

Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894) 14fn

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951) 45

La Crosse Telephone Corp. v. Wisconsin, Emp. Bd., 336 U. S. 18 (1949) 13fn, 15fn

Lanzetta v. New Jersey, 306 U. S. 451 (1939) 44

Lichter v. United States, 334 U. S. 742 (1948) 37

McGrain v. Daugherty, 273 U. S. 135 (1927) 46

Musser v. Utah, 333 U. S. 95 (1948) 44

Near v. Minnesota, 283 U. S. 697 (1931) 44

Old Colony Trust Co. v. Comm'r of Int. Rev., 279 U. S. 716 (1929) 13fn, 14

Panama Refining Co. v. Ryan, 293 U. S. 388 (1935) .. 37

Pfeiffer Brewing Co. v. Bowles, 146 F. 2d 1006 (Em. Ct. App., 1945), cert. den. 324 U. S. 865 35

Philadelphia Co. v. Stimson, 223 U. S. 605 (1912) 18fn

PAGE

Pierce v. Carskadon, 83 U. S. 234 (1872)..... 31

Pierce v. Society of Sisters, 268 U. S. 510 (1925)..... 18fn

Powell v. United States, 300 U. S. 276 (1937)..... 15fn

Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908).. 16fn

Public Service Comm'n v. Wycoff Co., 344 U. S. 237 (1952) 17fn, 18

Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939).....13fn, 14fn, 15fn, 16, 18fn

Rogers v. United States, 340 U. S. 367 (1951)..... 33

Rumely v. United States, 345 U. S. 41 (1953)..... 46

Saksagansky v. Weedin, 53 F. 2d 13 (C. C. A. 9th, 1931) 26

Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935)..... 37

Schenley Distillers Corp. v. United States, 326 U. S. 432 (1946)..... 16

Shaughnessy v. United States ex rel. Mezei, 345 U. S. 206 (1953) 25fn

Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177 (1938) 16, 18fn

Stark v. Wickard, 321 U. S. 288 (1944)..... 17fn

State of Oklahoma v. United States Civil Service Commission, 330 U. S. 127 (1947).....12, 13, 13fn, 15

Steuart & Bro. v. Bowles, 322 U. S. 398 (1944)..... 42

Stromberg v. California, 283 U. S. 359 (1931)..... 43

Takahashi v. Fish Comm'n, 334 U. S. 410 (1948)..30, 34, 46

Terrace v. Thompson, 263 U. S. 197 (1923)..... 18fn

Thomas v. Collins, 323 U. S. 516 (1945)..... 44

PAGE

United Public Workers v. Mitchell, 330 U. S. 75 (1947) 12

United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940) 18fn

United States v. Cardiff, 344 U. S. 174 (1952) 45

United States v. Carolina Products Corp., 315 U. S. 475 (1942) 40

United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 44

United States v. Lovett, 328 U. S. 303 (1946) 23

United States v. Heikinnen, 221 F. 2d 890 (C. A. 7th, 1955) 22fn

United States v. 11,150 Pounds of Butter, 195 F. 657 (C. C. A. 8th, 1912) 40

United States v. Los Angeles R. R., 273 U. S. 299 (1927) 13fn

United States v. Spector, 343 U. S. 169 (1952) ... 20, 21, 22, 22fn, 24

United States ex rel. Blankenstein v. Shaughnessy, 117 F. Supp. 699 (D. C. S. D. N. Y., 1953) 26

United States ex rel. Dzuro v. District Director, 102 F. Supp. 704 (D. C. S. D. N. Y., 1951) 26

United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537 (1950) 37

United States ex rel. Kusman v. Shaughnessy, 117 F. Supp. 541 (D. C. S. D. N. Y., 1953) 26

United States ex rel. Mezei v. Shaughnessy, 195 F. 2d 964 (C. A. 2d, 1952) 25, 26, 30, 32, 36

United States ex rel. Ross v. Wallis, 279 F. 401 (C. C. A. 2d, 1922) 25, 26

Walker v. Chief Quarantine Officer, 69 F. Supp. 980 (D. C. D. Canal Zone Div., 1943) 29

DARK PAGE

PAGE

Williams v. Fears, 179 U. S. 270 (1900) 28, 29, 45

Winters v. New York, 333 U. S. 507 (1948) 43, 46

Wong Wing v. United States, 163 U. S. 228 (1896) 21, 25, 27, 30, 32, 35, 36

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 34

Young, Ex parte, 209 U. S. 123 (1908) 19fn

United States Constitution Cited

Article I, §1 ..... 5, 37, 42

Article I, §9 ..... 10, 20, 23, 23fn

Article III, §2 ..... 3, 4

First Amendment 5, 11, 29, 43, 44, 46

Fourth Amendment 11, 46

Fifth Amendment 4, 5, 10, 11, 20, 22, 23fn, 24, 27, 30, 31, 34, 35, 43-47

Fourteenth Amendment 35

Statutes Cited

5 U. S. C. §1009 ..... 1, 3, 5, 11, 17

5 U. S. C. §1009(a) 8

5 U. S. C. §1009(b) 1, 3, 8

8 U. S. C. §137 23

8 U. S. C. §156(c) 20

8 U. S. C. §1251 ..... 23, 36

8 U. S. C. §1252(d) [Immig. and Nat. Act of 1952, Sec. 242(d); 66 Stat. 163] 1, 3-6, 8-11, 14, 20-24, 26, 27, 31-38, 40-43, 45-48

8 U. S. C. §1252(e) 20

8 U. S. C. §1302 34

BLEED THRU

PAGE

18 U. S. C. §2385 ..... 36, 41

28 U. S. C. §1253 1

28 U. S. C. §2101 1

28 U. S. C. §2282 ..... 1, 9

28 U. S. C. §2284 ..... 1, 9

28 U. S. C. §2284(3) 9

50 U. S. C. §783(f) 33, 36, 41

Regulation Cited

8 C. F. R. §242.3(c) 2, 5, 6, 8

Federal Rules Civil Procedure Cited

Rule 12(b) 8

Rule 41(1) 1

Rule 65(b) 8

Texts Cited

Borchard, Challenging "Penal" Statutes, 52 Yale L. J. 445 (1943) 17fn

25 N. C. L. Rev. 486, 487 (1947) 18fn

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

APPELLANTS' BRIEF

Opinion Below

The court below was a three-judge court, appointed pursuant to 28 U. S. C. §§2282 and 2284, sitting in and for the Southern District of New York. It rendered a single opinion for all of the above-captioned actions. This opinion (R. 157-65) is reported in 125 F. Supp. 498.

Jurisdiction

(i) The actions herein were instituted for judicial review of a final agency action, pursuant to 5 U. S. C. §1009, in forms of proceeding authorized by 5 U. S. C. §1009(b). This appeal is from an order and judgment dismissing the complaints and denying motions for injunctions *pendente lite*.

(ii) The opinion and order of the court below was rendered and entered on October 11, 1954 (R. 165) and a judgment thereon made and entered on December 1, 1954 (R. 166). Notice of appeal herein was filed on December 7, 1954 (R. 169). The record and jurisdictional statement herein were filed on January 15, 1955. Probable jurisdiction was noted on January 31, 1955 (R. 183). 348 U. S. 925. On April 25, 1955, the appellants were informed by the Clerk of this Court, that, pursuant to Rule 41(1), this brief was due to be filed on August 25, 1955. By stipulation of the parties and order of the Clerk, dated August 5, 1955, the time to file was extended to September 9, 1955.

(iii) Jurisdiction of the appeal herein is conferred upon this Court by 28 U. S. C. §§2101 and 1253.

Statutes Involved

The statute of the United States whose validity is involved is 8 U. S. C. §1252(d) [Section 242(d) of the Immigration and Nationality Act of 1952; 66 Stat. 163]. The text of this section is as follows:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or here-

after issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or wilfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

The administrative regulation promulgated pursuant to authority purportedly granted by the statute and whose validity is challenged is 8 C. F. R. §242.3(c) [Section 242.3 (c) of the Immigration and Nationality Regulations]. The text of this regulation is as follows:

> "An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of

such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of Section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

Questions Presented

(1) Whether an action under the Administrative Procedure Act, 5 U. S. C. §1009, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, for judicial review of that order in the form of proceeding authorized by 5 U. S. C. §1009(b), presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution.

(2) Whether an action for declaratory judgment, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanc-

tions for violation of the order may be imposed only by criminal process.

(3) Whether, in the action set forth in (2) above, the party plaintiff is entitled to temporary or permanent auxiliary equitable relief from the order, where it is shown that compliance with the order has or will deprive the plaintiff of liberty, property and civil rights and that violation of the order would subject the plaintiff to multiple criminal penalties.

(4) Whether an action for injunction or mandamus, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, to relieve the plaintiff from the obligations imposed upon him by the order, presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(5) Whether, in the action set forth in (4) above, it is a proper exercise of the court's discretion to grant relief, once the order—creating obligations, compliance with which deprives the plaintiff of liberty, property and civil rights and violation of which subjects him to multiple criminal penalties—is issued, although no violation of its terms has been committed and no criminal prosecution has been specifically threatened or begun.

(6) Whether 8 U. S. C. §1252(d), which attaches criminal consequences to an administratively found order of deportation and does not permit independent judicial inquiry into its validity, on its face, infringes upon procedural due process of law guaranteed by the Fifth Amendment, and, as applied to the deportation orders against the appellants which are based upon a finding of past membership in the Communist Party *eo nomine*, is a bill of attainder and *ex post facto* law.

DARK PAG

(7) Whether an alien, against whom a final administrative order of deportation has been outstanding for more than six months and whose deportation cannot be effected, subjected to "supervision", within the meaning of 8 U. S. C. §1252(d) and 8 C. F. R. §242.3(c) on their face and as applied, is thereby deprived of liberty and property without due process of law, subjected to punishment and deprived of equal protection of the law all in violation of the Fifth Amendment, and deprived of rights of free speech and association in violation of the First and Fifth Amendments to the United States Constitution.

(8) Whether 8 U. S. C. §1252(d), on its face, unlawfully delegates legislative power to the Attorney General, and, as applied, constitutes an unlawful usurpation by him of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(9) Whether 8 U. S. C. §1252(d), on its face and as applied, is so vague and indefinite as to encompass within its terms, constitutionally protected conduct and activity in violation of the First and Fifth Amendments and as to give inadequate notice of the crime created by it in violation of the Fifth Amendment to the United States Constitution.

(10) Whether the orders issued to the appellants, which establish conditions of "supervision", pursuant to 8 U. S. C. §1252(d) and 8 C. F. R. §242.3(c) are, on their face and as applied, unreasonable and an abuse of power, in violation of 8 U. S. C. §1252(d) and the Fifth Amendment to the United States Constitution.

Statement of the Case

The actions herein were brought by each of the appellants, under the Administrative Procedure Act, §1009 of Title 5, U. S. C., to review orders of Edward J. Shaughnessy, the District Director of the Third District of the Immigration and Naturalization Service, to wit: "Orders

PAGE BLEED THRU

of Supervision" issued by him to each of the appellants pursuant to the authority purportedly vested in him by 8 U. S. C. §1252(d) and the regulations promulgated thereunder by the Attorney General: 8 C. F. R. §242.3(c) (R. 1-10).

Each of the appellants is the subject of a deportation proceeding, and against each of them there has been entered a final administrative order of deportation (R. 3). These orders were based on an administrative finding, in each instance, that, after entering the United States, each of the appellants had been a member of the Communist Party of the United States (R. 18, 25, 33, 40, 45, 56, 63, 71, 78, 85, 92, 99, 108, 116). In each case, more than six months had elapsed between the entry of the deportation order and the issuance of the "Order of Supervision" (R. 3).

Where more than six months elapse after the entry of a final administrative order of deportation against an alien, the provisions of 8 U. S. C. §1252(d) and 8 C. F. R. §242.3(c) require that the alien be placed under "supervision" as defined by their provisions. Under the alleged authority of the statute and regulations, the appellee made and issued an "Order of Supervision" against each of the appellants. These "Orders of Supervision" imposed regulations of and restrictions upon the conduct and activities of each of the appellants substantially as follows:[1]

> "That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

---

1. The court below recognized that: "The orders of supervision vary in certain unimportant respects, e.g., in the numbering of regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted." (R. 162).

"That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

"That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

"That said alien shall report in [PERSON] on [day varies] of each week between 8:45 A.M. and 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

"That said alien shall terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.

"That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph 6.

"That said alien shall not violate Section 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code." (R. 3, App. Ex., R. 12-16).

The actions herein were commenced following the issuance of these orders (R. 3). The appellants, in effect, demanded "judicial review" of the "Orders of Supervision",

within the purview of 5 U. S. C. §1009(a), as "persons suffering legal wrong because of an agency action [and] adversely affected [and] aggrieved by such action." The complaints were bottomed upon the charge (1) that 8 U. S. C. §1252(d); 8 C. F. R. §242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon the conduct and activities of the appellants incorporated therein, are unconstitutional, invalid, illegal, void and inoperative; and (2) that the regulations of and restrictions upon the conduct and activities of the appellants, incorporated in the "Orders of Supervision", are unreasonable and an abuse of power (R. 5-10).

The "forms of proceeding for judicial review" elected by the appellants, under the prescriptions of 5 U. S. C. §1009(b) were actions for: (1) a judgment declaring unconstitutional, invalid, illegal, void and inoperative: 8 U. S. C. §1252(d); 8 C. F. R. §242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon their conduct and activities incorporated in the "Orders of Supervision"; and (2) as auxiliary relief, an order that the appellee (a) be directed to set aside and cancel the "Orders of Supervision"; and (b) be enjoined and restrained from requiring the appellants (i) to submit to supervision as required by the "Orders of Supervision"; or (ii) to comply with the regulations of or restrictions upon their conduct and activities, incorporated in the "Orders of Supervision" (R. 10). By orders to show cause, the appellants moved for equitable relief *pendente lite* (R. 15-16).

The appellee cross-moved with respect to all fourteen complaints for an order: (1) dismissing the complaints, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving extant temporary restraining orders, pursuant to Rule 65(b) of the Federal

DARK PAGE

Rules of Civil Procedure and 28 U. S. C. §2284(3); and (3) appointing a three-judge court, in accordance with the provisions of 28 U. S. C. §§2282 and 2284, to hear and determine the matters in issue (R. 124-26, 134, 135-37).

The appellee's application for the appointment of a three-judge court, unopposed by the appellants, was granted by orders dated June 21, 1954 (R. 145) and June 23, 1954 (R. 148). The case came on to be heard June 30, 1954 before Hon. HAROLD J. MEDINA, United States Circuit Judge, and Hon. JOHN F. X. MCGOHEY and Hon. EDWARD WEINFELD, United States District Judges (R. 150). On October 11, 1954, this court ordered that the complaints be dismissed for want of a justiciable controversy, the motions of the appellants for injunctions *pendente lite* denied, and the temporary restraining orders vacated (R. 165). A judgment to this effect was made and entered on December 1, 1954 (R. 166-68). The appeal herein is taken from this order and judgment.

Summary of Argument

1. The "orders of supervision" directed against the appellants and their promulgation by the appellee, are part of the regulatory scheme established by 8 U. S. C. §1252(d). They are final administrative orders. They fix specific responsibilities upon the appellants and impose an immediate direction of obedience by virtue of the legal consequences, which flow, by statute, from violation of their strictures. The legal authority of the appellee to make the orders is at issue between the parties. The Administrative Procedure Act makes such orders a matter of judicial cognizance in proceedings, as are in issue here, for a review of the orders' validity. These proceedings present a case and controversy in the constitutional sense and are, therefore, justiciable whether the form of proceeding is viewed as a special proceeding under the A.P.A. or a classic declaratory judgment or injunction action, all other requisite factors, as well, being present.

GE BLEED THRU

2. Illegality of an alien's presence in the United States is made a vital element of the crime created by 8 U. S. C. §1252(d). The statute is invalid on its face as a violation of procedural due process under the Fifth Amendment, in that it makes the administrative decision on that element conclusive on the criminal trial court and permits its establishment without a jury or the full measure of criminal proof. The criminal consequences attached to a deportation order by the statute, as aforesaid, render it, as applied to the appellants, a bill of attainder and *ex post facto* law in violation of Article I, §9.

3. The power to detain an alien or to substitute conditions restrictive of his liberty, short of detention, may exist constitutionally only as an incident to and in aid of the power to deport or exclude. Where the deportation proceeding is at an end and the power to deport has become inviable—whether temporarily or permanently—the incidental and auxiliary power to detain or supervise must fall. The statute, and administrative regulations here provide for, and the orders impose, restrictions upon the appellants' liberty under circumstances where the power to deport had become inviable. The restrictions, imposed without judicial trial, are a deprivation of liberty and property and inflict punishment without due process of law and deprive the appellants of the equal protection of the laws, all in violation of the Fifth Amendment.

4. Section 1252(d) of 8 U. S. C. unlawfully delegates legislative power to the Attorney General—and, by re-delegation, to the appellee—in that its language granting power is a *carte blanche* and the section establishes no policy or rule or principle to limit or guide the Attorney General or the appellee in framing regulations which constitute his supervision of aliens. The appellee usurped legislative power by incorporating provisions which make criminal, acts which Congress has declared to be non-criminal, and impose punishment for criminal acts beyond the penalties prescribed by Congress.

DARK PAGE

5. Section 1252(d) of 8 U. S. C. on its face is so vague and indefinite as to permit the imposition of restrictions of protected liberties, and as applied to the appellants by the "orders of supervision," impose restrictions on the appellants' rights under the First, Fourth and Fifth Amendments.

6. The restrictions upon the conduct and activity of the appellants by the "orders of supervision" are unreasonable, under the circumstances shown, in violation of 8 U. S. C. §1252(d) and the Fifth Amendment.

POINT I

A case and controversy exists between the parties to the actions herein.

The determination of the court below was made without reaching the merits of the controversy. It turned merely upon the resolution of a threshold jurisdictional question. The gravamen of its decision appears to be that:

> "The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate; and it has long been settled law that the constitutional powers of the courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do." (R. 163).

As this Court stated in *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291 (1906): "The soundness of the doctrine relied upon is undoubted. * * * The difficulty is that the doctrine is inapplicable to this case. * * * "

Section 1009 of Title 5, U. S. C., a section of the Administrative Procedure Act, authorizes judicial review of

AGE BLEED THRU

the rectitude of administrative orders by persons "aggrieved" by them. It is this remedy that the appellants sought. The decision of the court below reveals an unawareness that this was the relief requested. The premises upon which its conclusion is founded that it is "to clear for reasonable debate" that there is a "lack of any actual and existing controversy between the parties plaintiff and defendant" (R. 165) demonstrate the court's erroneous conception of the instant actions as devices to relieve the appellants, either by way of declaratory judgment or injunctive orders, from criminal prosecution. The decision below rested upon *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947)—inapt in any event—an action for simple declaratory judgment and injunctive relief, thus re-inforcing the impression that the court below neglected to adjudicate the right of the appellants to the specific remedy for which they brought suit. Mr. Justice FRANKFURTER, concurring in *State of Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127, 147 (1947), recognized the special character of the relief authorized by the review provisions of the Administrative Procedure Act and the need for their independent judicial interpretation.

> "The Administrative Procedure Act does not apply to the present case. * * * The Act will, in due course, present problems for adjudication. We ought not to anticipate them when, being irrelevant, they are not before us. The Act ought not to be used even for illustrative purpose because illustrations depend on construction of the Act. * * * "

The disposition of the court below to treat the appellants' demand for relief as so much surplusage, not only conflicts with such a view of the Administrative Procedure Act, but, in effect, repudiates its very existence. The empiric fact of its inscription on the statute books, however, is plain. The pattern for the construction of the section invoked by the appellants has been evolved by this Court

in decisions construing analogous laws. Application to this case of the rationale which guided this Court's prior determinations should inexorably have produced a result diametrically contrary to the determination made by the lower court.

The majority of this Court in the *Oklahoma* case, which was instituted under the review provisions of the Hatch Act, was based upon an underlying thesis appropriate to the pertinent provisions of the Administrative Procedure Act. It stated:

> "Congress has power to fix conditions for review of administrative orders. By providing for judicial review of the orders * * * Congress [made them] * * * a matter of judicial cognizance. * * * * " [at 137].

This expression is consonant with innumerable decisions of the Court, long acknowledged as the settled law. It has been held that where an administrative order is final,[2] and where the order commands the individual "to do or to refrain from doing anything,"[3] and where legal consequences may flow from the order,[4] the demand for judicial review presents, in the constitutional sense, a "case" or "controversy" between the parties.[5]

---

2. *La Crosse Telephone Corp.* v. *Wisconsin Emp. Bd.*, 336 U. S. 18 (1949); *Eccles* v. *Peoples' Bank of Lakewood Village*, 333 U. S. 426 (1948); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).
3. *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-10 (1927).
4. *Rochester Telephone Corp.* v. *United States*, *supra*, at 132-33.
5. *La Crosse Telephone Corp.* v. *United States*, *supra*; *State of Oklahoma* v. *United States Civil Service Comm'n*, *supra*; *Rochester Telephone Corp.* v. *United States*, *supra*; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156 (1939); *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933); *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930); *Old Colony Trust Co.* v. *Comm'r of Int. Rev.*, 279 U. S. 716 (1929); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893).

The controversy is said to relate to whether or not the administrator may, with legal impunity, require the subject of his order "to do or refrain from doing" those things specified in the order. The adverse parties are considered to be the administrator, insisting on his right, and the subject, resisting the demand as impermissible in law. In *Old Colony Trust Co.* v. *Commissioner of Int. Rev.*, *supra* at 724, the Court held:

> "In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax * * * and the taxpayer is resisting that payment. * * * That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. * * *"[6]

In the instant case, clearly, the "Orders of Supervision" are final, as the lower court itself recognized when it stated that the appellee "has no power to take any further action beyond what he has already done." (R. 163). Each "Order of Supervision" establishes a series of specific things that the appellants must do or refrain from doing. That legal consequences flow from the "Orders of Supervision" is evident under the challenged statute and it is recognized in the statement of the court below to the effect that: "A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine." (R. 164). The appellee asserts his right to promulgate and issue the "Orders of Supervision" and the appellants controvert the existence of such a right.

The court below misplaced its reliance on the *Mitchell* case, in which no specific order had been directed against

---

6. *Accord*: *Rochester Telephone Corp.* v. *United States*, *supra*; *Federal Power Commission* v. *Pacific Power & Light Co.*, *supra*; *Federal Radio Commission* v. *General Electric Co.*, *supra*; *Cf. Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894).

the individual complainants. In the instant actions, as in the *Oklahoma* case, the action of the administrator had ripened into a final administrative order, embodying specific directives, against the appellants. Controversy over such an order, in the analogous review proceedings of the *Oklahoma* case, was held to be justiciable by this Court.

That the "Orders of Supervision" are reviewable orders, the legal validity of which are in controversy, in the constitutional sense, between the appellants and the appellee, appears to be beyond doubt under the applicable authorities. The court below reasoned to a contrary conclusion from circumstances which this Court has held not to defeat judicial review.

The court below ruled that no present controversy exists because the "Orders of Supervision" in and of themselves do not inflict penalties for violation, but that the exaction of penalties depends on measures other than the issuance of the orders by the appellee (R. 164). That governmental action over and beyond the issuance of the "Orders of Supervision" is needed to effect sanctions for disobedience, does not detract from the present reviewability of the "Orders of Supervision". In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 417-18 (1942), the Court held:

> "The regulations are not less reviewable because their promulgation did not operate of their own force to deny or cancel a license. * * * Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. * * * Such regulations have the force of law before their sanctions are invoked as well as after. * * * When * * * they are promulgated by order * * * they are appropriately the subject of attack. * * * "[7]

7. *Accord*: *La Crosse Telephone Corp.* v. *United States, supra; Rochester Telephone Corp.* v. *United States, supra; Powell* v. *United States*, 300 U. S. 276 (1937).

The court below ruled that the controversy cannot exist between the appellants and the appellee because, upon violation of the "Orders of Supervision", it would not be the appellee but "the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted." (R. 164). Yet, in *Rochester Telephone Corp.* v. *United States, supra* at 136, the Court, discussing one of its prior opinions as having "partly yielded to the Government's main contention that the [review] statute applied only where the order [of the Commission] complained of was one which was to be enforced by the Commission," held:

> "More recent decisions of the Court, however, have dispensed with this requisite for review. * * * "

The rationale of this Court would seem to be that although the order is made by the administrator, "not for further proceedings by [himself], it is nonetheless a part of a regulatory scheme. * * * " *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 182 (1938). A court's mandate, under these circumstances, is considered an adequate conclusion of the controversy, for "while penalties may be imposed by the statute for its violation and not for disobedience of the [administrative] order, a favorable order [by the court] would render the prohibitions of the statute inoperative. * * * " *Rochester Telephone Corp.* v. *United States, supra* at 132-33. "Any other construction of [a review statute] would make it necessary for a [person] to take the risk of [acting] illegally and incurring criminal penalties in order to secure a determination [of his rights]." *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 436 (1946). The existence of an order fixing the responsibilities of its subject, is not an abstract declaration by an administrator, but "necessarily and immediately carries direction of obedience." *See*: *Rochester Telephone Corp.* v. *United States, supra* at 143-44. A complainant need neither violate the order,[8] as the court below suggests, or establish with cer-

8. *See*: *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210 (1908).

tainty, as it further insists, that proceedings will be begun to enforce the penalty incurred for non-compliance. *Columbia Broadcasting System* v. *United States, supra* at 418-20. "The purposes sought to be accomplished by [a review statute] would be defeated if a suitor were unable to resort to them to avoid * * * injury resulting from * * * the legal consequences of the [administrative] order * * * *" *Columbia Broadcasting System* v. *United States, supra* at 419.

It is quite clear, therefore, that the decision of the lower court in terms of 5 U. S. C. §1009, is contrary to settled precedent.

The decision of the court below would be in error even were the appellants not relying on the remedy accorded them by the Administrative Procedure Act. Administrative action has long been subject to challenge in ordinary injunction[9] and declaratory judgment[10] actions. The lower court's discomfort concerning the adversary character of the relationship between the appellants and the appellee, seems to stem from the fact that disobedience of the orders of the appellee incurs a penalty not to be effected by him. That this fact should have moved the court below to its conclusion that the parties are not adversaries would seem evidence of an infirmity which Professor Edwin Borchard considers general "in the field of statutes regulating commercial or civil life." He states: "* * * the appendage of a penalty to the regulation ["the least important element of the regulation"] seems to anesthetize the imagination and power of analysis."[11]

The approach of the court below is what has been termed "the unrealistic attitude that a person whose activities are within the purview of the statute can only be affected

9. *Stark* v. *Wickard*, 321 U. S. 288 (1944).
10. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952); *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541 (1948).
11. *Borchard, Challenging "Penal" Statutes*, 52 Yale L. J. 445, 475 (1943).

thereby when its sanctions are enforced against him."[12] This Court has rejected the idea that the issuance of the administrative order, separately enforceable, cannot presently injure the party subject to it in light of his present freedom to obey it or not. "They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. * * * *" *Columbia Broadcasting System* v. *United States*, *supra* at 419. The administrator is considered "part of the regulatory scheme,"[13] and a judgment adverse to his action will have effect in that it "will render the [penal] provisions of the statute inoperative."[14] It is clear that even under circumstances where the administrator is not to impose the penalties for violation of his order, he is, nonetheless, an adverse party, and a proper defendant. This Court has accepted him as such both in declaratory judgment[15] and injunction actions.[16]

Certainly violation of the order is no precondition to justiciability in a declaratory judgment action, whose function it is to avoid "any risk of suffering penalty, liability or prosecution." *Public Service Commission* v. *Wycoff Co.*, *supra* at 245-46.[17] Nor is it a prerequisite to injunctive relief.[18] Even were the effect of the injunctive relief to be deemed in the nature of an injunction against criminal prosecution, pre-enforcement relief would here be available.[19] The issuance of the order itself, part of the regula-

12. Note, 25 N. C. L. Rev. 486, 487 (1947).
13. *Shields* v. *Utah Idaho Cent. R. Co.*, *supra*.
14. *Rochester Telephone Corp.* v. *United States*, *supra*.
15. *Connecticut Mutual Life Ins. Co.* v. *Moore*, *supra*.
16. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912).
17. *See also*: *Alvater* v. *Freeman*, 319 U. S. 359 (1943).
18. *Hill* v. *Florida*, 325 U. S. 538 (1945); *Cf. United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940).
19. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Dobbins* v. *Los Angeles*, 195 U. S. 223 (1904); *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207 (1903).

tory scheme, as are the "Orders of Supervision", is sufficient notice of full enforcement of the statutory scheme to constitute the threat requisite to invoke equitable jurisdiction.[20] Particularly where the directives of the order are couched in language so vague as to render even purported compliance a risk, as is the language in the "Orders of Supervision", specific threat of the invocation of the criminal sanctions of the act is not of the essence.[21] The risk involved in violation of the "Orders of Supervision" is not prosecution for a single transaction. The "Orders", in effect, create an entire way of life for the appellants. In a single week, were the appellants to assume to live as though the "Orders" were not extant, the pyramided penalties for violation could jail them for the balance of their lives, and fines imposed could total more than their life-time's expectation of income. Historically, in such circumstances, courts of equity have assumed the power to act to avert such injury.[22]

From the view of declaratory judgment or injunction actions, the lower court's decision would appear to be an anachronism and in conflict with precedent established by this Court.

The controversy between the parties is justiciable, in the Constitutional sense, under any view of the form of procedure pursued by the appellants.

---

20. *City Bank* v. *Schnader*, 291 U. S. 24 (1934).

21. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925).

22. *See e.g.*: *Ex parte Young*, 209 U. S. 123 (1908); *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

BLEED THRU

POINT II

Section 1252(d), on its face, deprives appellants of procedural due process in violation of the Fifth Amendment and, as applied, violates Article 1, Section 9 of the United States Constitution.

(a) Section 1252(d), on its face, violates the due process clause of the Fifth Amendment.

In *United States* v. *Spector,* 343 U. S. 169 (1952), the Supreme Court had before it Section 20(c) of the Immigration Act of 1917, as rewritten in Section 23 of the Internal Security Act of 1950 [8 U. S. C. §156(c)], which is presently rewritten as Section 242(e) of the Immigration and Nationality Act of 1952 [8 U. S. C. §1252(e)]. That statute, in the words of Mr. Justice JACKSON, "creates a crime * * * based on unlawful residence in the United States. The crime consists of two elements, one, an outstanding order for deportation of an alien, the other, the alien's willful failure to leave the country or take specific steps toward departure." *United States* v. *Spector, supra* at 177.

The majority of the court did not consider the question of whether the statute, on its face, constituted a denial of procedural due process of law, for the reason that:

> "That question was neither raised by the appellee nor briefed nor argued here." [*Id.* at 172].

The Court added:

> "If it had been, we might consider it. [*Ibid*] * * * That question is not foreclosed by this opinion." [*Id.* at 173].

Mr. Justice JACKSON, speaking in dissent with the concurrence of Mr. Justice FRANKFURTER, characterized, as follows, the Court's omission to treat the procedural due process aspects of the statute. He stated:

> "The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel." [*Id.* at 180].

Mr. Justice BLACK, dissenting separately on the main issue decided by the majority, on this question, stated nevertheless:

> "My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by Mr. Justice Jackson, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz*, 333 U. S. 56, 78-81." [*Id.* at 174, ftn. 2].

Mr. Justice JACKSON, with the concurrence of Justices FRANKFURTER and BLACK, on the issue left open by the majority, considered the statute, on its face, to be unconstitutional, in reliance upon *Wong Wing* v. *United States*, 163 U. S. 228 (1896), for the following reason:

> "The Act does not permit the court which tries [the alien] for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted." [*Id.* at 177].

Section 1252(d) creates a crime analogous to that in the *Spector* case. It consists of two similar elements: one, an outstanding order for deportation of an alien; the other, the alien's willful or knowing failure to comply with regulations of and restrictions upon his conduct imposed by the Attorney General. Read as Mr. Justice JACKSON reads the *Spector* section, Section 1252(d) clearly does "not permit the court which tries [the alien] for this crime to pass on the legality of his presence." Under Section 1252(d)

also, the "the production of an outstanding administrative order for [the alien's] deportation becomes conclusive evidence" of his deportability and the "consequent duty" to comply with the regulations of and restrictions upon his conduct. Neither does Section 1252(d) permit "inquiry into the correctness or validity of the order." Under it, too, "a deportation order is made to carry potential criminal consequences," and the administrative decision on the issue of unlawful presence is made "conclusive upon the criminal trial court," thus permitting this "vital element" of the crime to be established without a jury trial. *United States* v. *Spector, op. cit. supra* at 177-78.[23]

Mr. Justice JACKSON concluded in the *Spector* case that since the "adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime," the government constitutionally, may not be permitted to "use the result as a conclusive determination of that fact in a criminal proceeding." *Id.* at 178, 179. The statute, in that it enabled such a procedure, he considered to be unconstitutional on its face as a violation of the Fifth Amendment. These same conclusions are impelled in the instant proceedings by the existence, in the section of the statute involved here, of identical constitutionally objectionable elements.

---

23. *United States* v. *Heikinnen*, 221 F. 2d 890 (C. A. 7th, 1955), decided after this Court's decision in the *Spector* case, ruled that the constitutional application of the statute requires, if demanded, judicial review by the trial court of the validity of the deportation order upon which the criminal charge rests. Such a construction of the statute, or of its analogue which is here at issue, is inadequate to overcome the constitutional objections interposed by Mr. Justice JACKSON in the *Spector* case. That court's reading of the statute, in fact, is confirmation that the statute makes conclusive on the trial court the administrative determination of the "vital element" of the illegality of the alien's presence, arrived at, without a criminal jury, on less than the full measure of criminal proof.

(b) Section 1252(d), as applied, is a bill of attainder and *ex post facto* law.

As applied to the facts of this case, Section 1252(d), in making the deportation orders against the appellants "carry potential criminal penalties," is a bill of attainder and an *ex post facto* law in violation of Article 1, Section 9 of the United States Constitution.

The orders of deportation against the appellants rest upon the findings of fact and conclusions of law, under 8 U. S. C. §137 [now 8 U. S. C. §1251], that the appellants had been, after entry, members of the Communist Party.

The Act, under which the appellants were found deportable, obviously makes deportable members of an easily identifiable class, namely: "alien members of the Communist Party of the United States." This designation, as well, is one that differed from all prior designations of deportable aliens, which had theretofore been enacted into law by Congress. *See*: *Carlson* v. *Landon,* 342 U. S. 524, 535 (1952).

Thus, the deportation statute, under which the instant deportation orders were procured is, in that it is directed at the members of an easily identifiable class, in the nature of a bill of attainder. *United States* v. *Lovett,* 328 U. S. 303 (1946). And since it relates to past conduct, not theretofore subject to legal sanction, it is in the nature of an *ex post facto law*. *See*: *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952).[24]

In the *Harisiades* case, *supra,* however, it was considered that, in line with prior adjudications, the constitutional objections to the deportation statute as a bill of at-

24. *Galvan* v. *Press,* 347 U. S. 522 (1954) is not to the contrary insofar as the Court approved the constitutionality of the statutory designation of the Communist Party *co nomine* only in terms of its reasonableness as a classification under the Fifth Amendment, and not with regard to the prohibitions of Article 1, Section 9 of the United States Constitution.

tainder and *ex post facto* law could not prevail for the reason that a deportation proceeding was civil and not criminal in nature, and deportation itself, not punishment for a crime. The Court there declared:

> "It has always been considered that that which [is forbidden] is penal legislation. * * * Deportation, however, severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy, supra* at 594.

This was re-emphasized, as has been shown by Mr. Justice JACKSON, in the *Spector* case, in his statement: "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations." *United States* v. *Spector, supra* at 178.

Section 1252(d), however, as has been shown, adds such "criminal consequences and connotations". It, therefore, supplies the one element, the absence of which has been relied upon to uphold the constitutionality of the deportation statute which created the new category of deportables: "alien members of the Communist Party." Under the circumstances, as applied to these appellants, Section 1252(d) constitutes a bill of attainder and an *ex post facto* law.

POINT III

Section 1252(d), on its face and as applied, deprives appellants of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

It is well-settled and existing law that aliens, except for liability to deportation and its "incidents", are to be accorded, as a matter of constitutional mandate, all property and civil rights and liberties accorded to citizens. *See, e.g.*

Chew v. *Colding*, 344 U. S. 590, 596, ftn. 5 (1953); *Bridges* v. *Wixon*, 326 U. S. 135 (1945). The political power of the government to expel aliens deemed undesirable, however, cannot be used to deprive them of these liberties and property rights without due process of law. *United States ex rel. Ross* v. *Wallis*, 279 F. 401, 403 (C. C. A. 2d, 1922); *Petition of Brooks*, 5 F. 2d 238, 239 (D. C. D. Mass. 1925).

The power to hold in custody or otherwise restrict the liberty of deportable aliens, by administrative fiat and without judicial trial, has been permitted only as an "incident" to the power to deport or exclude, pending deportation proceedings, and "while arrangements were being made for their deportation." *Wong Wing* v. *United States, supra; see, Carlson* v. *Landon, supra.*

The Court of Appeals for the Second Circuit recently restated the rule, as extant law. In its decision in *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, 967 (C. A. 2d, 1952), the Court said:[25]

> "* * * the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See Walker v. Chief Quarantine Officer, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men * * * such confinement must violate the Fifth Amendment."
>
> "* * * But where * * * confinement is no longer justifiable as a means to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, 'whether citi-

25. Reversed as inapplicable to an *excludable* alien as opposed to *deportable* aliens as are the appellants. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953).

zens, aliens, alien enemies or enemy belligerents'. Rutledge, J., dissenting in Re Yamashita, 327 U. S. 1, 41, 42."

Section 1252(d) fixes the period during which the Attorney General may hold an undesirable alien in confinement while arranging for his actual deportation. If he has not arranged for, or effectuated the alien's removal within six months after a final administrative order of deportation has been made, his power to detain the alien ends, and the alien must be given his freedom. See: *United States ex rel. Mezei* v. *Shaughnessy, supra* at 968; *United States ex rel. Kusman* v. *Shaughnessy,* 117 F. Supp. 541, 544-45 (D. C. S. D. N. Y. 1953); *United States ex rel. Blankenstein* v. *Shaughnessy,* 117 F. Supp. 699, 701, 703 (D. C. S. D. N. Y. 1953).

This provision has been construed to accord with constitutional mandates [*United States ex rel. Mezei* v. *Shaughnessy, op. cit. supra* at 967], and comports with judicial interpretation as to the propriety of the exercise of powers incidental to the right to deport. The courts generally have held that custody, whether by direct physical detention or by other control, pending actual deportation, which exceeds four to six months, constitutes an unreasonable and, therefore, an unlawful restraint. *United States ex rel, Ross* v. *Wallis, supra; Petition of Brooks, supra; Saksagansky* v. *Weedin,* 53 F. 2d 13 (C. C. A. 9th, 1931); *United States ex rel, Dzuro* v. *District Director,* 102 F. Supp. 704 (D. C. S. D. N. Y. 1951).

Subsection (d) of Section 1252, however, purports to extend authority to exercise powers, normally incidental to deportation, even after the power to deport has become—either temporarily or permanently—inviable, by reason of the inability to effect deportation. The Attorney General is authorized and directed to supervise and impose conditions and restrictions upon the life, liberty and property of those aliens whose removal from the United States has

DARK PAGE

been ordered, but cannot or may not be effected, for an unlimited time after, by statute—the same statute—the power to detain to make "arrangements" for deportation, has ended.

These powers transcend the political power of the government to deport and to restrain or regulate as an "incident" to deportation. Since the conditions and restrictions which Section 1252(d) prescribes be placed upon an alien's liberty and property may, under the terms of Section 1252(d), be imposed without resort to "those indicia of legal procedure that are embedded in the constitution as the right of all men," they constitute an illegal and unconstitutional deprivation of the alien's liberty and property. The statute, in that it authorizes such deprivations, violates, on its face, the due process provision of the Fifth Amendment.

In *Wong Wing* v. *United States, supra,* this Court clearly determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and, constituted a violation of the Fifth Amendment. The Court struck down the "Geary Act" [Section 4, Act of May 5, 1892] as a transgression of the Fifth Amendment, for authorizing a year's imprisonment for Chinese aliens found, without judicial trials, to be in this country unlawfully. It held that Congress cannot "promote its policy in respect to Chinese persons by adding to its provisions for their expulsion and exclusion punishment by imprisonment at hard labour", inflicted without judicial trial. *Id.* at 235.

The rationale of the Court relating to the Geary Act is clearly applicable to Section 1252(d), which is its analogue. The Geary Act, in the view of the Court, without judicial trial, deprived Chinese aliens of liberty by authorizing their imprisonment for a year. Section 1252(d) similarly seeks, without judicial trial, to deprive aliens of liberty and property by subjecting them to supervision which

SE BLEED THRU

does and may further circumscribe their movements, restrict and impair their normal living and their right to work for an unlimited period of time—conceivably as long as they may live or until their departure from the United States can be effected. "Liberty" is not restricted in its import to freedom from imprisonment. This Court, in its recent decision, *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) ruled:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * *"

See also: *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897); *Bauer* v. *Acheson*, 106 F. Supp. 445, 450 (D. C. D. C. 1952).

That the power to deport does not, as well, include the right, without judicial trial, to restrict and impair freedom, liberty and property rights of aliens, although short of actual imprisonment, was sharply enunciated by Circuit Judge ANDERSON in *Petition of Brooks, supra.* The order of deportation against the alien in that case, concededly, could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge ANDERSON rejected this contention as unlawful and pointed out:

> "He is entitled to be deported or to have his freedom * * * any further detention by the Immigration authorities *or control of* [*the alien's*] *freedom is illegal.*" [at 235, 240] (Emphasis added.)

The conditions circumscribing and restricting the lives and livelihoods of the instant appellants, authorized by the statute and imposed by the appellee, are such a "control of [their] freedom" as to render illegal both the statute, the regulation and the "Orders of Supervision" requiring the appellants to conform to the conditions.

Subjection to "supervision" is itself a "control of freedom" of far greater consequence than the control by bond in *Petition of Brooks, supra.* The statute here, moreover, requires and the "Orders of Supervision" direct the appellants to report to an officer of the Immigration and Naturalization Service, a restriction of freedom disapproved in *Petition of Brooks, supra.* The requirement that the appellants appear for medical or psychiatric examination is clearly of the same nature. The requirements of some of the appellants that they remain within a 50 mile radius of Times Square and remain residents of the Third Immigration District, unless with express permission of the appellee to be granted or withheld in his unrestricted discretion, are clearly deprivations of their liberty. In *Williams* v. *Fears, supra,* this Court declared:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the constitution." [at 274]

Accord: *Bauer* v. *Acheson, supra; Walker* v. *Chief Quarantine Officer,* 69 F. Supp. 980, 983 (D. C. D. Canal Zone Div. 1943).

The appellants are required to relinquish membership in the Communist Party—not in itself illegal; cease all support of, and all activities on behalf of all policies and doctrines of the Communist Party and its "affiliates"—whether legal or not; end their association with all members of the Communist Party or its affiliates, whether political in character, social or business, innocent or otherwise; to supply any and all information regardless of constitutional or common law privilege. The right to be free of such restrictions is a right accorded to aliens, and is undeniable, even after "judicial trial," as an infringement of First Amendment rights.

The "supervision" authorized by the statute is of such a latitude that it may be employed to—and in fact has—

affect or deprive the appellants of their jobs and livelihoods, a property right which is theirs under the Constitution. *See*: *Takahashi* v. *Fish Comm'n*, 334 U. S. 410 (1948) and cases cited therein.

The deprivation of the rights and liberties authorized by Section 1252(d) and accomplished here by the "Orders of Supervision", under circumstances where the exercise of the power to deprive no longer rests on the power to deport or powers incidental thereto, violates the Fifth Amendment, since the restrictions on liberty and property are imposed without due process of law, but by administrative fiat.

In *Carlson* v. *Landon, supra,* the approval of the exercise of discretion to detain, based on the statutory criterion that detention would serve to eliminate an arrested alien's "opportunity to hurt the United States," hinged on the incidental power to detain *pending determination of deportability,* an area within the plenary power of Congress to expel, apparently, under the *Carlson* case, without let or hindrance from the Fifth Amendment. The rationale of the *Carlson* case is inapplicable here. In the instant cases, the deportation proceedings are completely at an end, and deportation has become "patently impossible" for an unforeseeable period of time. The Congress may not "promote its policy" to protect the United States from the alleged activities which allegedly render an alien undesirable, "by adding to its provision for their expulsion and exclusion" deprivations of life, liberty and property without judicial trial. *Wong Wing* v. *United States, supra.* There exist still in the nation, for its protection, investigative agencies, criminal statutes, and "the speedy indictment and trial of actual crime in the courts." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 969. No other mode may be adopted consonant with constitutional due process.

POINT IV

Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth Amendment to the United States Constitution.

In *Cummings* v. *Missouri*, 71 U. S. 277, 320 (1866), this Court established the proposition that:

> "The deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact. * * *"

The statute in question here permits the deprivation of, and the "Orders of Supervision" made against the appellants, deprive them of liberty, and rights—civil, political and property. *See*: Point III, *supra*. In the circumstances under which these seemingly civil disabilities are authorized and were applied here, they constitute punishment. *See also*: *Ex parte Garland*, 71 U. S. 333 (1866); *Pierce* v. *Carskadon*, 83 U. S. 234 (1872); *Burgess* v. *Salmon*, 97 U. S. 381 (1878); *Harisiades* v. *Shaughnessy*, *supra*. The single "circumstance" that will render a civil disability a penalty or a punishment, is the absence of a reasonable relation to the power which the civil disability is intended to aid. *Cummings* v. *Missouri*, *supra* at 319-20.

Congress has, concededly, the plenary power to deport aliens it deems undesirable. As an incident to this power, it may authorize the control or the restriction of an alien's liberty pending deportation and while arrangements are being made for the actual deportation, on criteria which it deems fit, including its evaluation of the effect of the alien's freedom upon the welfare of the nation. [*See*: *Carlson* v. *Landon*, *supra*.] The power to employ such a criterion, as a basis for detention or control, ends when the power to detain or control ends: with the termination of the proceeding to deport and at that time when "deporta-

tion becomes patently impossible." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 967; *Wong Wing* v. *United States, supra.*

The power to "supervise" granted by Section 1252(d) and the "supervisory" power exercised over these appellants, have no reasonable relation to the exercise of any of the powers which Congress may exercise or authorize over deportation and the deportable alien. It is possible to see, from an analysis of the "Orders of Supervision" this lack of relation, which displays, as the oath in the *Cummings* case, *supra,* the punitive purport of the "Orders":

> "It was required to reach the person, not the calling. It was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." [at 320]

That the statute was not intended to be directed at control of the alien pending the conclusion of deportation proceedings, is patent from the fact that Section 1252(d) does not become applicable until six months after the final conclusion of a deportation proceeding. It is likewise clear that it is not a temporary control while arrangements are being made for deportation, for it is precisely the impossibility of effecting deportation within the prior six months that juvenates the power to supervise under Section 1252(d). And it comes into effect after that period during which the determination as to whether to control or not to control the liberty of the alien may be made on the basis of an evaluation that it is necessary for the welfare of the nation. *See*: *Carlson* v. *Landon, supra.*

Nor can it be said that the statute or the "Orders of Supervision" are related to a power, perhaps inherent in the power to deport: to insure the capacity to deport and

DARK PAGE

to avoid the frustration of that power. The disabilities imposed by the "Orders of Supervision" which most clearly indicate the punitive character of all of the disabilities, even those innocent on their face, appear in paragraphs 6 and 7 of the "Orders". [In some instances, the paragraph numbers are 5-a and 5-b.]

Paragraph 6 commands the appellants to terminate their membership in the Communist Party and its "affiliates" and their support and activity in behalf of the doctrines and policies of both. Paragraph 7 requires that the appellants refrain from any or any type of association with members of the Communist Party and its "affiliates" or persons who support the doctrines or policies of either.

It is clear that mere membership in the Communist Party is not a crime. *See*: *Rogers* v. *United States*, 340 U. S. 367, 732, ftn. 12 (1951); 50 U. S. C. §783(f). It must, therefore, necessarily be so that other or different "associations" between Communists may be equally innocent. Paragraphs 6 and 7 of the "Orders of Supervision" deprive the appellants of their rights to these legal associations, to income which accrues to some of them as a result of these legal associations, and punishes a breach of the inhibitions against those associations by criminal penalties. Of these paragraphs, propounded under the aegis of Section 1252(d), it may be truly said, as in the *Cummings* case: "* * * it was thought that the several acts deserved punishment, and * * * there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

The remaining paragraphs of the "Orders" establish, as a substitute for the jail to which these appellants may not be sent, a system of police surveillance over their lives that differs only in degree, but not in kind, from imprisonment, and is, in fact, in the nature of a house arrest. They are limited in their travel area and their unrestricted choice of residence. They must report in person. Subsection (3) of the statute and paragraph 2 of the "Orders", providing

BLEED THRU

for physical and mental examination and sweeping unlimited interrogatories, subject the appellants, as Justice BLACK, for the majority, stated in *Hines* v. *Davidowitz*, 312 U. S. 52, 71 (1941): "to a system of indiscriminate questioning similar to the espionage systems existing in other lands." An innocent purpose is not to be attributed to these regulations. They are not needed here to insure the deportation of these appellants. The "Orders" require that the appellants appear for deportation, when it can be effected [Paragraph (1)]. Their whereabouts are constantly known to the government by virtue of their alien registration, pursuant to 8 U. S. C. §1302, and changes in their residence must also be made known, and have been. These appellants, heretofore, have met their legal obligations to appear at all times when they might have been legally summoned.

Section 1252(d) authorizes, and the "Orders" herein provide a substitute for prison and penalties. They are punishment. Inflicted without due process of law, and solely by administrative fiat, they are in violation of the Fifth Amendment.

POINT V

Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

It has been well-settled law since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantee of equal protection of the laws extends not only to citizens, but to aliens as well. In the recent case of *Takahashi* v. *Fish Comm'n*, *supra*, this Court expressed the extant law to be:

> "The Fourteenth Amendment and the laws adopted under its authority * * * embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [at 420]

DARK PAGE

It has been held that the due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations—concepts which are the core of the equal protection clause. See *Detroit Bank* v. *United States*, 317 U. S. 329 (1943); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Carleton Screw Products Co.* v. *Fleming*, 126 F. 2d 537 (C. C. A. 8th, 1942), *cert. den.* 317 U. S. 634; *Pfeiffer Brewing Co.* v. *Bowles*, 146 F. 2d 1006 (Em. Ct. App., 1945), *cert. den.* 324 U. S. 865.

A fortiori, the Fifth Amendment, just as the Fourteenth, constitutes a protection for the alien from statutes which impose upon him, *by reason of alienage alone*, certain burdens. *Wong Wing* v. *United States, supra.* Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States, renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what non-citizens shall be permitted to remain within our borders." *Carlson* v. *Landon, supra* at 534. The power to detain, or, instead, to impose regulations on conduct to insure the deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon, supra* at 538. Where, as has already been demonstrated, the power to deport ceases or is rendered ineffectual, constitutional authority to exercise the powers over the alien, incidental to deportation, ceases. By the terms of Section 1252, the authority to detain, or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation. The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is resident in the United States, until such time as he can be deported, and a beneficiary of the rights guaranteed by the Constitution to all people within our borders.

GE BLEED THRU

Section 1252(d) seeks to impose upon the alien whose deportation cannot be effectuated within the six months period, a series of requirements and restrictions, unrelated to the deportation or effectuation of the deportation of the alien. The controls sought to be imposed by Section 1252(d) relate rather to control of the conduct deemed "undesirable." The regulations of conduct, activity or association authorized by the statute on its face and, more specifically as applied here, neither this law, nor any other, prescribes for a citizen.

There is little question that the character of conduct, activity and association included in the 17 categories of aliens legislatively declared undesirable [8 U. S. C. §1251] would be and is considered equally undesirable on the part of citizens. This is evidenced by the fact, certainly as to the conduct which it has been found rendered the appellants deportable, of the existence of penal statutes proscribing such conduct. *See*: *e.g.* 18 U. S. C. §2385; 50 U. S. C. §783.

The conduct, activity, or association rendering aliens "undesirable" and deportable, therefore, cannot reasonably set such aliens apart from citizens engaged in the same allegedly "undesirable" conduct, activity, or association, in terms of the control of such activities. No more harm results to the nation from one than the other. *See*: *Wong Wing* v. *United States*, *supra*. Both are subject to the same penal sanctions designed to safeguard the society and the nation. In *United States ex rel. Mezei* v. *Shaughnessy*, *supra*, the Court of Appeals for the Second Circuit stated:

> "* * * we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; the speedy indictment and trial of actual crime in the courts still obtain." [at 969]

The added burdens imposed by Section 1252(d), on its face and as applied here, upon aliens, is, patently, by reason

of alienage alone. Clearly then, the statute which authorizes the imposition of these regulations, the rules promulgated thereunder, and the "Orders of Supervision" issued in alleged pursuance thereof, deprive the appellants of the equal protection of the laws in violation of the Fifth Amendment.

POINT VI

Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(a) Section 1252(d) is an unlawful delegation of power.

Section 1252(d) commends "any alien" against whom a final administrative order of deportation has been outstanding for more than six months, to the supervision of the Attorney General under regulations prescribed by him.

For such a delegation of power to be constitutionally valid under Article 1, Section 1 of the Constitution, the statute must declare a guiding "policy", or establish a "rule", or an "intelligible principle", or such policy, rule or principle must be found in the "purpose of the act, its factual background and the statutory context in which they appear." *United States ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537, 543 (1950); *Lichter* v. *United States*, 334 U. S. 742, 785 (1948); *American Power & Light Co.* v. *Securities & Exch. Comm'n*, 329 U. S. 90, 104-5 (1946); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935).

The section itself establishes no policy or rule or principle to limit or guide the Attorney General in framing regulations which constitute his supervision of aliens. Although subsections (1), (2) and (3) of Section 1252(d) appear to direct, specifically, the character of certain supervisory

regulations, subsection (4), which requires an alien "to conform to such reasonable written restriction on his conduct and activity as are prescribed by the Attorney General," invests the Attorney General with an unlimited and undefined power, not only to regulate beyond the specific prescription of subsections (1), (2), and (3), but as to any other matter he may choose.

While it has been said that the Congressional purpose in deportation laws, at least as to alleged Communist aliens, in terms of securing their expulsion and protecting American society from such activity on their part pending deportation, provides an adequate statutory guide [*See*: *Carlson* v. *Landon*, *supra* at 543-4], it is clear from the terms and provisions of Section 1252(d) that this standard is obviously not intended to be the guide to the administrative discretion to be exercised under Section 1252(d).

Subsection (3), for instance, requires an alien to submit to interrogation, not only as to his "nationality, circumstances, habits, associations, and activities," but, as well, concerning "such other information, *whether or not related to the foregoing.*" (Emphasis added.) The delegation of power to demand information, thus unrelated, grants to the Attorney General a roving commission. No corner of an alien's mind, no idea, no belief, no thought, is free from administrative scrutiny. No business activity, political activity, or personal activity is free of the power to interrogate. No association, no matter how innocent, licit, or personal, is protected by the right to privacy.

It is difficult to understand, on the face of it, the relationship between the requirement that *any and every* deportable alien be required to subject himself, under subsection (2), to medical and psychiatric examination, and the eventual effectuation of his deportation or the protection of the community pending it. As to mental defectives or prostitutes, perhaps a relationship exists. But why as to Communists? And how frequent an examination is needed to protect the community? Once a week?

Every day? Twice a day? Must the alien be ill? Or may he be subjected to examination even if well? There is no guide provided in the statute to direct the Attorney General, or to prevent him from converting this subsection into an instrument of harassment or oppression.

In the instant case, under subsection (1), the appellants are required to appear personally, a condition, which, as to some creates a severe physical hardship, and as to all a serious interference with lawful, gainful occupations. Yet, under the terms of the subsection, the Attorney General may require daily reporting, which would render it impossible to retain any job. For the statute sets no standard for how much "identification" is necessary to insure the alien's deportation or to "protect" the community until the alien may be deported.

Subsection (4) is a *carte blanche*. The Attorney General, under it, may, without restriction, control the alien's life. Here, many of the "Orders of Supervision" limit travel to a 50 mile radius from Times Square. Under the statute, the Attorney General is as free to make it 10 miles, or to confine the alien to his own home and yard. Is the Communist less of a "menace" in the Times Square area than on the eastern shore of Maryland or on the Connecticut Sound? Or perhaps is there greater safety in some American-created Siberia?

Here some of the appellants are required to discontinue their membership in the Communist Party, although to do that, would mean the loss of their lawful jobs, their only source of income. If this may be accomplished thus indirectly, has the Attorney General not the power to order that they resign other lawful jobs or forfeit other financial benefits? And has he not as well the power to order them to resign from the American Legion, the Catholic Church, the National Association for the Advancement of Colored People? He has ordered the appellants to cease their associations with other Communists, although some of them

must continue such associations to maintain lawful occupations or would desire to continue such associations to extend lawful social relations, many of long standing. If this may be accomplished thus indirectly, is the appellee not free to order them to stop association with all other Americans, on the "germ" theory of the spread of Communism and thus place the appellants in virtual solitary confinement within their 50 mile circle?

By virtue of the delegation granted by Section 1252(d), to control the lives of and restrict the liberty of aliens—violation constituting a felony bearing criminal penalty—the Attorney General has been given a free hand. In fact, by virtue of the criminal penalty, he has been given power to legislate a series of crimes, for conduct or activity, which is not otherwise, and, in some instances, could not be made criminal.

The "Orders of Supervision" here were made in alleged pursuance of such an unlawful delegation of power. The "Orders" and the statute must, therefore, be declared invalid and void and in violation of Article 1, Section 1 of the United States Constitution.

(b) The supervisory conditions imposed here are a usurpation of a legislative power.

It is well settled that: "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter*, 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Products Corp.*, 315 U. S. 475, 489 (1942).

DARK PAGE E

(1) *As to Paragraphs 6 and 7 of the "Orders of Supervision"*

Section 4(f) of the Internal Security Act of 1950 [50 U. S. C. §783(f)] provides:

> "Neither the holding of office nor membership in any Communist organization shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

Yet paragraphs 6 and 7 of the "Orders of Supervision" [in some instances 5-a and 5-b] proscribe membership in the Communist Party and its "affiliates". Violations of the proscriptions of paragraphs 6 and 7 become subject to the criminal penalties provided by Section 1252(d). The action of the appellee, therefore, in incorporating paragraphs 6 and 7 in the "Orders" "has the effect to subject * * * persons to fines and penalties under the act, that are excluded therefrom, by the terms of" the Internal Security Act of 1950.

Clearly this assumption of power by the administrative officer, contrary to the express policy and provision of Congress, is a usurpation of Congress' legislative function, in violation of Article 1, Section 1 of the Constitution.

(2) *As to paragraph 8 of the "Orders of Supervision"*

Paragraph 8 of the "Orders of Supervision" [in some instances 5-c] direct that the alien:

> "* * * shall not violate sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Sec. 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

Section 2385 of the "Smith" Act provides that as the penalty for its violation, the convict:

> "Shall be fined not more than $10,000 or imprisonment not more than ten years, or both, * * *."

E BLEED THRU

The penalty section of Section 4 of the Internal Security Act provides:

> "Any person who violates any provision of this section, shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both * * *."

It was the design of Congress that *these* should be the penalties for violating either law. The inclusion of a further prohibition against their violation in the "Orders of Supervision"—an obvious redundancy in light of the existence of the statutes—has the effect, only, of increasing the penalties for their violation by applying to such violation the additional criminal penalties of Section 1252(d): namely, an additional year's imprisonment and fine of an additional $1,000.

Of such administrative action, this Court said in *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 404 (1944):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Wallace* v. *Cutten, supra*, [298 U. S. 229]."

Paragraph 8 is, therefore, manifestly a violation of Article 1, Section 1 of the United States Constitution.

POINT VII

Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States.

A statute which, on its face and as applied, is so vague and indefinite, as to permit within its scope its administrators and enforcers, to burden, prohibit or make criminal, conduct and belief which are constitutionally permissible and protected, violates the Fifth Amendment and, as well, the constitutional provision protective of the exercise of such conduct or the holding of such belief. *Winters* v. *New York*, 333 U. S. 507 (1948); *Herndon* v. *Lowery*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

(a) As to Subsection (4).

Subsection (4) of Section 1252(d), in according to the Attorney General an undefined latitude to impose "written restrictions on [the alien's] conduct and activity," and in making criminal their violation, is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York, supra* at 509. An alien, whether deportable or not, while in residence here is entitled to the guarantees of freedom of speech, press and association protected by the First Amendment. *Bridges* v. *Wixon, supra; see*: *Chew* v. *Colding, supra.*

The statute, as applied in the instant case by the "Orders of Supervision," does in fact create restrictions upon the conduct of the appellants which deprive them of First Amendment rights. The "Orders of Supervision" command each of the appellants, with minor deviations in some instances, to:

> "* * * terminate, and remain disassociated from, membership in, if any, support or other activity, if any,

in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization."

"* * * refrain from associating with any person, knowing or having reasonable ground to believe that such a person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in [the above] Paragraph."

The mere statement of these blanket prohibitions is adequate to demonstrate that they are the type of ban that is prohibited by the First Amendment's guarantees of freedom of speech, press and assembly. *American Communications Association* v. *Douds, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931).

Furthermore, the language of the prohibitions referred to above is so vague and indefinite as to make it impossible for the appellants to ascertain what it is they must or may not do, under criminal penalty, in violation of their rights under the Fifth Amendment. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const. Co.,* 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921).

What is to be deemed "support" of doctrines and policies of the Communist Party? What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? What is meant by "doctrines" or "policies" of the Communist Party? What is to be deemed an "affiliate" of the Communist Party? There is no legislative or judicial finding as to which organizations are

"affiliates" of the Communist Party, or of the Communist Parties of the various states, or political or geographical subdivisions of the states, or of the various foreign countries. *See*: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). With whom shall the appellants refrain from associating? What is meant by "associating" under this paragraph? What is "reasonable ground to believe" that a person is a Communist? Each of the appellants has alleged that his reading of the order reveals that its language could support a variety of interpretations and that he is at a loss to know by just which among them his conduct is to be governed (R. 22-23, 29-31, 36-38, 44-45, 49-52, 59-61, 67-69, 74-76, 81-83, 89-90, 93-96, 102-06, 111-15, 119-23).

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the appellants must make such determinations at the risk of criminal indictment. As this Court recently said in *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

By virtue of the undefined latitude of subsection (4) of Section 1252(d), the Attorney General, in the "Orders of Supervision" deprives the appellants of the liberty—without due process of law—to travel beyond a radius of 50 miles from Times Square. Such restrictions on freedom of movement have been held to be deprivations of liberty in violation of the Fifth Amendment. See: *Williams* v. *Fears*, *supra*; *Allgeyer* v. *Louisiana*, *supra*; *Bauer* v. *Acheson*, *supra*.

Similarly, the indefiniteness of subsection (4) has enabled the appellee to impose the condition, contained in

paragraph 3-b of the "Orders of Supervision", that the appellants may not change their places of residence without the express permission of the Immigration Service, to be granted or withheld in its apparently unrestricted discretion. Not only does this condition constitute the same type of deprivation of liberty as the 50-mile travel restriction, but it has been and may, as well, be applied to frustrate a removal of residence designed by the appellants in aid of their employment, or to secure or better their livelihoods—property rights which accrue to them under the constitution. *See*: *Takahashi* v. *Fish Comm'n, supra.*

(b) As to Subsection (3).

Subsection (3) of Section 1252(d) authorizes the Attorney General to, and by paragraph 2 of the "Orders of Supervision" he requires the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, whether or not related to the foregoing as the Attorney General may deem fit and proper." No unlimited power to interrogate resides in any branch of the government. *See*: *e.g., McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Rumely* v. *United States*, 345 U. S. 41 (1953). Unless it is an aid to the proper exercise of some power which the government may constitutionally have, the usurpation of a right to examine may violate one or more of the constitutionally protected rights of the subject of the interrogation. Subsection (3) of Section 1252(d), on its face, is a license to the Attorney General to exercise the power granted by it "whether or not related" to the subject—or the constitutional authority on which it rests—of the statute. This statutory mandate, so broad as to permit its exercise in areas protected by the First and Fourth Amendments of the United States Constitution, is void in violation of those Amendments and the Fifth Amendment. *Cf. Winters* v. *New York, supra.*

(c) As to Subsections (1) and (2).

Subsections (1) and (2) of Section 1252(d), requiring appearance for identification "from time to time" and for medical and psychiatric examination "when necessary" are so indefinite in their direction, as to permit the Attorney General to convert those requirements into means of depriving an alien of his liberty or property.

"From time to time," or "when necessary" is not a limitation, but an absence of limitation. The Attorney General is free to compel an alien to appear daily or twice or three times a day, making such appearances a virtual substitute for physical detention. This reporting may become so frequent as to make the strain of it a serious threat to the alien's health, or so time-consuming as to make it impossible for an alien to retain a job to support himself or his family. In the instant cases, it seriously affects both aspects of the appellants' lives (R. 19-20, 26-28, 34-35, 41-42, 52-53, 57-58, 64-65, 71-73, 78-80, 96, 101, 109-10).

Such an undefined grant of power cannot be squared with the Fifth Amendment.

POINT VIII

The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power.

Section 1252(d) requires that the restrictions imposed by the Attorney General on the conduct or activity of the alien be "reasonable". Each of the appellants, in his complaint and affidavit in support of his motion for temporary relief, has set forth facts to establish that, as to each of them, the regulations of and restrictions upon his con-

duct are unreasonable and an abuse of power (R. 17, 24, 32, 39, 47, 55, 62, 70, 77, 84, 91, 98, 107, 115). It is submitted that, even assuming *arguendo* the constitutional validity of Section 1252(d) and the provisions of the "Orders of Supervision," the "Orders," being unreasonable, are illegal and should not be enforced.

CONCLUSION

Plenary consideration of this appeal should be afforded to the appellants, the decision of the court below reversed, and the relief requested by the appellants granted.

Respectfully submitted,

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Plaintiffs-Appellants.

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional, statutory and regulatory provisions involved	3
Statement	7
Summary of argument	16
Argument	24
I. There is no case or controversy appropriate for judicial determination	24
A. Hypothetical issues, based on speculation and fear that appellee in the future may possibly interfere with appellants' rights, are not justiciable under the Constitution	27
B. Appellants have failed to exhaust available administrative remedies	29
C. Under controlling prior decisions, broad and ill-defined constitutional issues are not appropriate for judicial determination, where the occasion for the imposition of enforcement sanctions has not yet arisen and may never arise	32
II. The provision for general supervision of aliens ordered deported whose deportability has not been effected is constitutional on its face	39
A. No unconstitutional deprivation of liberty and no punishment is imposed by the statute	42
B. There is no denial of equal protection	48
C. The fact that orders of deportation are issued pursuant to administrative proceedings does not make unconstitutional the imposition of criminal penalties, subject to trial by jury, upon persons under such orders who thereafter willfully and knowingly violate the supervisory provisions	49

362802—55——1

Argument—Continued Page
D. No bill of attainder or ex post facto law is here involved 53
E. No unconstitutional delegation or usurpation of legislative power or unconstitutional vagueness is involved 54
III. The orders of supervision are proper under the statute 60
Conclusion 69
Appendices:
A. Constitutional and statutory provisions relating to justiciability 70
B. Affidavit submitted in opposition to motion for a stay pending appeal 73
C. Further analysis relating to the issue of justiciability 78

CITATIONS

Cases:
Adler v. *Board of Education*, 342 U. S. 485 25
Aetna Life Insurance Co. v *Haworth* 300 U. S. 227 80
Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450 27, 37, 80
Bauer v. *Acheson*, 106 F. Supp. 445 63
Blankenstein v. *Shaughnessy*, 117 F. Supp. 699 46
Brooks, Petition of, 5 F. 2d 238 46, 47
Carlson v. *Landon*, 342 U. S. 524 20, 22, 42, 54, 56, 59
Coffman v. *Breeze Corporations*, 323 U. S. 316 80
Connally v. *General Const. Co.*, 269 U. S. 385 67
Connecticut Mutual Life Ins. Co. v. *Moore*, 333 U. S. 541 25
Cox v. *United States*, 332 U. S. 442 50
Douglas v. *Jeannette*, 319 U. S. 157 81
Dzuro v. *District Director*, 102 F. Supp. 704 46, 47
Eccles v. *Peoples Bank*, 333 U. S. 426 80
Electric Bond Co. v. *Securities and Exchange Comm'n.*, 303 U. S. 419 38
Flynn v. *United States*, 348 U. S. 909, 956 8
Galvan v. *Press*, 347 U. S. 522 21, 41, 54, 65

Cases—Continued

	Page
Harisiades v. *Shaughnessy*, 342 U. S. 580	21, 54
International Longshoremen's Union v. *Boyd*, 347 U. S. 222	17, 25, 27, 33, 34, 81, 82
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123	25, 81
Kusman v. *District Director*, 117 F. Supp. 541	46
Lanzetta v. *New Jersey*, 306 U. S. 451	67
Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540	31
Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U. S. 270	28
Massachusetts v. *Mellon*, 262 U. S. 447	80
Mezei v. *Shaughnessy*, 195 F. 2d 964, reversed as inapplicable to an excludable alien, 345 U. S. 206	46
Musser v. *Utah*, 333 U. S. 95	67
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	31
Ross v. *Wallis*, 279 Fed. 401	46
Saksagansky v. *Weedin*, 53 F. 2d 13	46
Shaughnessy v. *Mezei*, 345 U. S. 206	47
Stearns v. *Wood*, 236 U. S. 75	27
Steuart & Bro. v. *Bowles*, 322 U. S. 398	58
Stromberg v. *California*, 283 U. S. 359	67
Texas v. *Interstate Commerce Commission*, 258 U. S. 158	27
United Public Workers v. *Mitchell*, 330 U. S. 75	15, 17, 25, 27, 33, 35, 37, 78
United States v. *Cardiff*, 344 U. S. 174	67
United States v. *Cohen Grocery Co.*, 255 U. S. 81	67
United States v. *Harriss*, 347 U. S. 612	82
United States v. *Sing Tuck*, 194 U. S. 161	32
United States v. *Spector*, 343 U. S. 169	52
United States v. *Wurzbach*, 280 U. S. 396	68
Whitehouse v. *Illinois Central R. Co.*, 349 U. S. 336	83
Williams v. *Fears*, 179 U. S. 270	62
Wong Wing v. *United States*, 163 U. S. 228	42, 45, 46, 51
Yakus v. *United States*, 321 U. S. 414	50

	Page
Constitution:	
Article I, Section 1	3
Article I, Section 9	4
Article III, Section 2	3, 27, 70
First Amendment	4
Fourth Amendment	4
Fifth Amendment	4
Statutes:	
Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, Section 10	3, 36, 70, 71, 72
Federal Declaratory Judgment Act, as codified, 28 U. S. C. 2201	3, 37, 70
Immigration and Nationality Act of 1952, 66 Stat. 163; 8 U. S. C. 1101, *et. seq.*:	
Section 241	53
Section 242 (d)	2, 4, 5, 6, 7, 8, 24, 27, 30, 34
Section 242 (h)	8
Sections 262–266	61
Miscellaneous:	
8 C. F. R. 242.3 (c)	6, 9
32 C. F. R. 1621.16	61
32 C. F. R. 1641.3	61
Davis, K. C., *Ripeness of Governmental Action for Judicial Review*, 68 Harv. L. Rev. 1122–1153, 1326–1373	25

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR, APPELLANTS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, APPELLANTS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the specially convened three-judge District Court (R. 157–165) is reported at 125 F. Supp. 498.

JURISDICTION

The fourteen appellants began fourteen substantially similar actions in which they sought, *inter alia,* to enjoin on constitutional grounds the enforcement and operation of Section 242 (d) of the Immigration and Nationality Act of 1952, *infra,* pp. 4–5. On June 21, 1954, an order was entered convening a statutory three-judge District Court to hear the fourteen cases (R. 145–146).

On October 11, 1954, the statutory court filed a single opinion and order dismissing all fourteen complaints, on the ground that there was no justiciable controversy (R. 157–165). On December 1, 1954, a single judgment was entered thereon (R. 166–168). On December 7, 1954, appellants filed their notice of appeal (R. 169–178). This court noted probable jurisdiction on January 31, 1955 (R. 183). The jurisdiction of this Court to review on direct appeal the order and judgment of the District Court is invoked under 28 U. S. C. 1253 and 2101.

QUESTIONS PRESENTED

1. Whether appellants have alleged a case or controversy appropriate for judicial determination.

2. If it is assumed that a justiciable case or controversy is presented, whether the judgment below should be affirmed on the ground that the statute subjecting aliens, against whom a final order of deportation has been issued, to supervision pending eventual deportation, is constitutional on its face and has been properly applied.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. PROVISIONS RELATING TO JUSTICIABILITY

As regards the threshold problem of justiciability, the relevant Constitutional and statutory provisions are: Article III, Section 2, of the Constitution; the Federal declaratory judgment statute, 28 U. S. C. 2201, which permits an action for a declaratory judgment in cases of "actual controversy"; and Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1009. These provisions are set forth, in pertinent part, in Appendix A, *infra,* at pp. 70–72.

B. PROVISIONS RELATING TO THE MERITS

1. *The Constitution:* Appellants invoke the Constitutional provisions set forth below:

Article I, Section 1, insofar as relied upon, provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, * * *.

Article I, Section 9, insofar as relied upon, provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The First Amendment, insofar as relied upon, provides:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, * * *.

The Fourth Amendment, insofar as relied upon, provides:

> The right of the people to be secure in their persons, * * * against unreasonable searches and seizures, shall not be violated, * * *.

The Fifth Amendment, insofar as relied upon, provides:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

2. *The Statute:* Section 242 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232,[1] 8 U. S. C. (1952 ed. Supp. II) 1252

[1] This amendment deleted the words "shall upon conviction be guilty of a felony, and" from the list of sanctions set forth in the final sentence.

(d), provides:

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

3. *The Regulations:* As amended July 20, 1954, 8 C. F. R. (1955 Supp.) 242.3 (c), promulgated pursuant to Section 242 (d), *supra,* provides:

> *Release; supervision after six months' period has expired: warning of penal provisions.*
>
> An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242 (d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:
>
> (1) Appear from time to time at specified times or intervals before an officer of the Service for identification;
>
> (2) Submit, if necessary, to medical and psychiatric examination at government expense;
>
> (3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed.

STATEMENT

All fourteen appellants are aliens who have been ordered deported because of membership in the Communist Party (R. 18, 25, 33, 40, 48, 56, 63, 71, 78, 85, 92, 99, 108, 116). Each appellant brought a substantially similar action in the United States District Court for the Southern District of New York against appellee Shaughnessy, the District Director of Immigration (R. 1–15).[2] In these fourteen actions appellants seek declaratory judgments and injunctive relief, alleging that Section 242 (d) of the Immigration and Nationality Act of 1952, *supra,* pp. 4–5, the regulations thereunder, *supra,* pp. 6–7, and certain orders of supervision issued pursuant thereto, are unconstitutional and invalid (R. 5–10). A specially convened three-judge District Court (R. 145–149) entered an order (R. 165) and a judgment (R. 166–168) dismissing all fourteen complaints, on the ground that no justiciable controversy had been alleged (R. 163–165).

---

[2] The printed record contains only one of the fourteen complaints, that filed by appellant Nukk. By agreement, the remaining thirteen complaints, all of which are substantially similar to that filed by appellant Nukk, were not printed. They are, however, part of the certified record on file with this Court (see R. i–ii).

1. *The facts* pertinent to the issues raised on this direct appeal may be summarized as follows:

In each of these fourteen cases more than six months elapsed, after the entry of the final order of deportation, without deportation having been effected, thus rendering each appellant subject to the supervision requirements of Section 242 (d), *supra,* pp. 4–5. In three of the cases, those of appellants Gannett, Bittleman, and Jones, the deportation orders were not executed because these appellants had not yet begun to serve prison sentences imposed following convictions under the Smith Act.[3] In the remaining eleven, deportation could not be effected because no country was found which would admit these aliens.

Section 242 (d) provides that all such aliens, pending eventual deportation, shall "be subject to supervision under regulations prescribed by the Attorney General". It also provides that these regulations shall "require any alien subject to supervision (1) to appear from time to time before

---

[3] Under Section 242 (h) of the Act, 66 Stat. 212, 8 U. S. C. 1252 (h), an alien sentenced to imprisonment cannot be deported until his sentence has been served. When their actions were begun, appellants Gannett, Bittleman and Jones were free on bail awaiting the outcome of their Smith Act conviction appeal. As they have been in prison since the denial of their petition for certiorari in *Flynn* v. *United States*, 348 U. S. 909 and 956, they are no longer subject to the orders of supervision whose validity they are here challenging. Thus as to them, the instant cause appears to be moot.

an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case". The prescribed regulations are found in 8 C. F. R. 242.3 (c), *supra,* pp. 6–7, and closely follow the statutory language.

Pursuant to this statute and to the regulations issued thereunder, each appellant was served with an "order of supervision" (R. 18, 25, 33, 40, 48, 56, 63, 71, 78, 85, 92, 100, 108, 117), notifying him that, pending his deportation, he was being permitted to remain at large, but subject to supervision on certain stated terms. These fourteen orders are all substantially similar, although they differ slightly in certain unimportant respects (see R. 162).[4]

[4] Owing to the close similarity of each of the fourteen orders of supervision, only that served upon appellant Nukk has been included in the printed record (R. 12–15). In each action, a copy of the pertinent supervision order was annexed as "Exhibit A" to the complaint, and thus appears in the certified record on appeal. Cf., fn. 2, *supra*, p. 7.

The orders (*e. g.*, R. 12–15), with minor variations, require each alien to report either in person or in writing at stated intervals [5] to the officer in charge of the Immigration and Naturalization Service in the district; to notify the officer in charge of any change in residence or employment within the district within 48 hours after the change; to apply for permission to change the place of residence from one immigration district to another; and to report, when requested, for medical and psychiatric examination and to "furnish such information as may be deemed fit and proper" (R. 13).

In addition, each alien is required to disassociate himself from activities in furtherance of Communist Party doctrines and policies, and to refrain from knowingly associating with any person who is a member of or affiliated with the Communist Party.[6] The prohibition against as-

---

[5] Originally most of the appellants were required to report weekly, but this provision was subsequently administratively modified to require reporting but once each month (see Appendix B, *infra*, p. 74).

[6] In forbidding further Communist Party activities and associations, the supervision order set forth in the printed record provides (R. 13–14):

> (5) (a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any

sociating is expressly stated not to apply to members of the alien's family or to professional legal counsel, provided the associations are not used in the furtherance of the proscribed activities (R. 13–14). In the cases of the three appellants who have been convicted of violating the Smith Act and in about half of the remaining cases, the alien was directed not to travel more than 50 miles from Times Square, New York, without prior written permission. As regards the minor variations in the respective orders, the court below noted that the "orders of supervision vary in certain unimportant respects, *e. g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel

---

state, any section, subsidiary branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

limitation of 50 miles is omitted" (R. 162).[7]

All fourteen complaints contain a number of general allegations that the supervision orders are unreasonable and unnecessary (*e. g.*, R. 7–9), each alien specifically claiming that (a) he has always been available in the past, (b) he intends in good faith to continue to be available, and (c) there are no reasonable grounds from which to infer he will not continue to be available (*e. g.*, R. 8). In affidavits filed in support of motions for temporary restraining orders against the enforcement of the orders of supervision, appellants recite instances of personal inconvenience and loss of time (*e. g.*, R. 35, 41), and, in some cases, allege change or loss of employment claimed to be the result of the reporting requirements and restrictions (*e. g.*, R. 19–20, 26–27).

Some of the affidavits contain charges that the statutory provisions for medical and psychiatric examination are to be used to "lay the groundwork" for "brain washing" and "for declaring political dissidents insane" (R. 100, 109, 118). In virtually identical language, all fourteen affi-

[7] While the case was pending before the District Court, the fourteen orders of supervision were administratively modified in various respects which were called to that court's attention by an affidavit of December 12, 1954, which is set forth, in pertinent part, in Appendix B, *infra*, pp. 73–74. The principal modification, in addition to the liberalization of the reporting requirement already noted, *supra*, p. 10, fn. 5, was in providing a more convenient and centrally located place for reporting in New York City, thus avoiding the inconvenience of periodic trips to Ellis Island.

davits also express a fear that under the supervision orders they may be asked such questions as:

> * * * what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. [R. 28, 35–36, 43, 73. See also R. 21, 54, 59, 66, 81, 88, 97, 102, 111 and 119.]

These particular charges are not supported by any factual allegations that any appellant had ever been requested, while under supervision, to report for or submit to any medical or psychiatric examination, or had ever been asked questions of the type set forth.[8]

The actual practices and policies followed in the New York District respecting these matters are stated in detail in an affidavit (R. 127–133), filed on behalf of appellee, which was not controverted by appellants and which states that appellants' charges have no reasonable connection with the law, regulations or manner in which the law has been and will be enforced (R. 129). Thus

---

[8] In substantially similar language, a number of the affidavits allege questioning and delay upon the occasions for reporting but none of them sets forth any example of any specific question actually asked nor gives the least detail as to the conversations (R. 20–21, 28, 35, 42–43, 53–54, 58–59, 66, 73, 87). The questioning is uniformly characterized as "sweeping interrogatories as to my associations and activities" (*e. g.*, R. 21).

362802—55——2

medical and psychiatric examinations of aliens under supervision are in fact required only (a) where health certificates are requested by a foreign country before it will issue travel documents; (b) where necessary for the protection of the health of the alien or of others; or (c) to verify a claimed illness "so that an alien may be excused from any conditions of parole which may interfere with such person's health" (R. 129–131). Similarly, when aliens are subjected to questioning it is primarily to gain information required in the preparation of applications for travel documents and visas and to discover what efforts they are making to effectuate the ordered deportation (R. 131–133).

Not one of the fourteen complaints or supporting affidavits alleges that appellants have in any respect violated any provision of the challenged orders of supervision, or that they have sought administrative relief for any of their alleged difficulties. Moreover, the complaint in at least one case, that of appellant Jones, affirmatively shows that the provision prohibiting travel outside of a 50-mile radius from Times Square was in fact modified to permit her to stay at a health resort to recuperate from an illness.[9]

[9] See Exhibit A to appellant Jones' complaint, which, though not printed, appears at pp. 485–487 of the certified record. The exhibit also shows that this appellant's order was further modified, presumably to accommodate her particular health problem, to permit her to report in writing rather than in person. (See also R. 118–119, 131.)

2. *Proceedings in the District Court.* In each of the fourteen suits, the aliens, by orders to show cause (*e. g.,* R. 15–16) moved for a temporary injunction against enforcement of the orders of supervision, and were granted temporary restraining orders as regards some of the provisions of the challenged orders (R. 16; see also R. 140, 155–156). Appellee cross-moved, *inter alia,* to vacate the temporary restraining orders and to dismiss the complaints for failure to state a claim upon which relief could be granted (R. 124–126, 134–137).

A statutory three-judge court was convened (R. 145–149) and, after hearing argument, concluded that the fourteen complaints had been prematurely filed and failed to state a justiciable controversy between the parties (R. 163). In its opinion (per Medina, C. J.), the court pointed out that appellants had not violated the statute, and that appellee, the District Director, had neither the power to proceed against appellants for a violation nor had he or anyone else threatened to do so (R. 163–164). In so holding, the court relied, *inter alia,* upon the refusal of this Court, in *United Public Workers* v. *Mitchell,* 330 U. S. 75, to grant "advisory opinions upon broad claims of rights" (330 U. S. at 89) (R. 164–165). On December 1, 1954, the court entered a single judgment vacating the temporary restraining orders and dismissing the fourteen complaints

(R. 166–168). Appellants then took their direct appeal to this Court.

SUMMARY OF ARGUMENT

I

Appellants are aliens awaiting deportation. They do not and cannot here challenge their status as such deportable aliens. Nor do they allege that they have violated the statute, the regulation, or the requirements in the orders providing a degree of supervision pending the effecting of their deportation. Correspondingly, they cannot allege any threat of prosecution. Their complaint, in essence, is with respect to the inconvenience and alleged hardship of the various details of the supervision. The three-judge court below properly held that no justiciable case or controversy between the parties had been reached.

The question of the justiciability of appellants' claims is complicated by the unusually large number of broad constitutional issues raised, and by the wide variations in their relative degree of ripeness for judicial review. Some of the issues are non-justiciable because they rest entirely on speculation and fear that appellee in the future may possibly interfere in certain respects with appellants' rights. Such matters fall outside the scope of the constitutionally delegated judicial power. Many of the issues are non-justiciable because of appellants' failure to exhaust administrative remedies.

However, as to one issue, whether appellants can be subjected to any supervision at all, the problem of justiciability is a close one. Although this one issue seems to meet the superficial minimum constitutional requirements of a "case" or "controversy", it does not arise in a sufficiently concrete factual setting to meet those additional requirements of justiciability, developed as a matter of sound judicial discretion in such cases as *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222.

A. A large part of appellants' attack on the statute and the orders of supervision relate to their hypothetical speculations as to what may or may not happen under the orders of supervision. They ask this Court to give an advisory opinion as to whether appellants should or should not obey the statute enacted by Congress and the orders issued thereunder by the administrative authority which has been entrusted by Congress with the fixing of numerous discretionary details. Such a request does not present a justiciable case within the constitutional limits of the federal judicial power.

B. Appellants fail to set forth any efforts on their part to avail themselves of the discretionary latitude in the supervision. They allege no applications to obtain modifications of the supervisory provisions to the full extent permissible within the administrative process, even though

the record discloses that, where amelioration of the limitation on travel was requested upon a reasonable basis, the request was granted. It thus appears that the administrative process is far from exhausted, and the final factual situation is not yet before the courts in concrete form.

C. The single issue of whether it is *per se* unlawful and injurious for appellants to be subjected to any supervision whatsoever presumably gives rise to a present controversy, since appellants have in fact been subjected to supervision. However, the courts have wisely refused to exercise their discretionary authority to determine broad constitutional issues presented in cases having some of the elements of a present controversy, but where the indispensable concrete factual background is largely, though not wholly, *in futuro*. This is particularly true where, as here, ill-defined constitutional issues are raised, where the occasion for the imposition of enforcement sanctions has not yet arisen and may never arise, and where the litigants seek what is essentially an advance advisory ruling to determine the legal consequences of future conduct in which they desire to engage.

Should this Court conclude, in spite of the presence of these factors which are customarily held to preclude justiciability, that the issue of the constitutional right to supervise aliens awaiting deportation is ripe and appropriate for adjudication in this litigation, this is the only issue

which is properly before the courts. Appellants cannot, by raising this broad issue, require this Court to pass in advance on numerous details of a complex supervisory structure which are not bottomed on concrete, existing factual situations.

II

Assuming that the issue of the general right to supervise is justiciable, the judgment of the court below should be affirmed on the merits, since there can be no serious question of the power of Congress to require some supervision of aliens against whom unexecuted final orders of deportation are outstanding. Appellants have not contended that the orders for their deportation are defective or unlawful in any manner. Their status as undesirable aliens who should not be in the country at all is uncontroverted. As such, there is danger that they may attempt to disappear into the general population to frustrate deportation. Moreover, appellants, as members of the Communist Party, will probably continue to support the party, since even the former brake on such activity, through the threat of deportation, has now ceased. On this score, they have nothing more to lose. Appellants are not to be equated with ordinary citizens or resident aliens who do not have to be located for the purpose of deportation, and for whom the ordinary criminal sanctions against misconduct are sup-

plemented by a substantial stake in a long future life in the United States.

A. Appellants' special status, and the special safeguards necessitated by that status, dispose of their contentions that they are being unreasonably deprived of liberty or punished without a judicial trial. That special status, which is closer to that of an excludable than a resident alien, clearly justifies some form of special treatment. The treatment specified by Congress, which is not detention, but is not yet full and absolute freedom, is reasonable. Supervision which is in many ways less burdensome than that normally imposed on members of the armed forces cannot be equated to imprisonment or other punishment. Nor can reasonable restrictions on freedom of movement. Such supervision and restrictions bear a direct relationship to the purpose of the statute of keeping deportable aliens from vanishing into the general population and using their freedom to the detriment of internal security. It was recognized in *Carlson* v. *Landon,* 342 U. S. 524, that aliens who are only in the course of proceedings for deportation may pose a variety of problems warranting their being placed in actual custody as a precautionary measure. The need is the more pronounced when, as here, the aliens are not merely awaiting a finding that they are deportable but have actually been found so.

B. Since appellants, as deportable aliens whose deportation has not been effected, are clearly in a special class, reasonable statutory provisions limited to that class do not involve any unreasonable classification and do not deny appellants equal protection of the laws.

C. The statute is not unconstitutional in imposing criminal penalties upon conduct by persons in a status—*i. e.,* deportability—which is arrived at administratively. The offense does not consist in becoming deportable, but in willful acts which take place thereafter, in violation of supervisory restrictions pertinent to persons awaiting deportation. The statute is not invalid merely because it attaches criminal consequences to conduct of persons who violate administrative determinations. The courts have long sustained criminal penalties for violations of administratively issued selective service orders, price control regulations, rate regulations, license requirements, and the like.

D. Appellants' indirect challenge of the deportation order on the ground that the statute authorizing deportation of alien members of the Communist Party is a bill of attainder or *ex post facto* law has been disposed of on direct challenge in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, and *Galvan* v. *Press,* 347 U. S. 522.

E. Appellants' contention that unconstitutional delegation and usurpation of legislative power is here involved, is mere reargument of what has

been settled, *a fortiori,* in *Carlson* v. *Landon,* 342 U. S. 524, 542–544. As there pointed out, an appropriate standard, under which executive and administrative agencies are to operate, need not prescribe each detail for decision, but the Congress may rest upon the guidance furnished by the policy of the legislation. Here, as in *Carlson,* the basic policy, "to guard against Communist activities" (342 U. S. at 544) provides a sufficient guide for administrative action. The standard was held adequate in *Carlson* for the more drastic discretionary action of deciding, prior to final determination of deportability, on custody for the alien as against enlargement, even though the statute was less specific than the one here involved. The present statute is clearly adequate for the less drastic administrative details of supervision challenged in this case.

III

Appellants' attacks on the orders of supervision, insofar as they go beyond a general attack on the right to supervise at all, are based largely on speculation as to what might occur, or involve matters as to which there has been no exhaustion of administrative remedies.

The right to supervise clearly implies the right to require some reporting by aliens, notification of change of address and limitations on travel without permission beyond a reasonable radius. The provision for medical and psychiatric exami-

nation is reasonably necessary to enable the government to obtain the information demanded by foreign countries who may be willing to take the aliens.

The right to supervision also carries with it the right to require persons subject thereto to answer questions as to whether the various provisions are being obeyed. Appellants' speculation that they may be asked questions which are irrelevant or which may tend to incriminate them cannot form the basis of an attack on the orders, in the absence of a showing that such anticipated events have in fact occurred. Such issues can be litigated as they arise. The orders of supervision refer merely to the furnishing of "such information as may be deemed fit and proper".

The provisions against further support of the Communist Party are reasonable in the light of the fact that the aliens are being expelled because of their membership in the Communist Party.

Improper delegation or usurpation is not established, as appellants here contend, by conjecture as to hypothetical excesses which an administrative official might seek to justify as within the scope of the delegation. No such excesses appear in the present supervisory orders.

Appellants' complaint concerning vagueness, when stripped of its commingling with other types of complaint, narrows down to an attack on the requirement that appellants must cease affording support to the Communist Party or its policies

and refrain from associations with persons affording such support. There is no genuine occasion for appellants to misunderstand the requirement. The language specifically provides that it is not to apply to association with members of the family or legal counsel for purposes not in furtherance of the party policies. With respect to any doubtful, borderline activities or associations, appellants can make inquiry of the administrative authorities. Moreover, sufficient protection against any genuine slip-up or misunderstanding is afforded by the statutory requirement that a violation be willful or knowing.

ARGUMENT

I

THERE IS NO CASE OR CONTROVERSY APPROPRIATE FOR JUDICIAL DETERMINATION

In this litigation, appellants make a broad constitutional attack on the validity of Section 242 (d) of the Immigration and Nationality Act of 1952, *supra,* pp. 4–5, and on the orders of supervision issued thereunder. Before reaching the merits,[10] this Court must determine whether the three-judge court below correctly held that appellants' suits were prematurely brought and raised no justiciable controversy between the parties.

---

[10] The merits are discussed *infra*, pp. 39–69.

The abstract principles which govern whether a claim involves a case or controversy appropriate for judicial determination are well recognized and are not in dispute. See, *e. g.*, *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222, 224 (dissenting opinion of Mr. Justice Black). Yet great difficulty frequently arises in the proper application of these principles to specific situations. While all agree that remote or abstract or hypothetical problems are nonjusticiable, there has been substantial disagreement in a number of close cases as to how to determine whether a particular matter has become sufficiently well-defined and concrete to permit a proper and wise exercise of the judicial function. See especially *International Longshoremen's Union* v. *Boyd, supra; Adler* v. *Board of Education,* 342 U. S. 485; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *Connecticut Mutual Life Ins. Co.* v. *Moore,* 333 U. S. 541; and *United Public Workers* v. *Mitchell,* 330 U. S. 75. See also Davis, K. C., *Ripeness of Governmental Action for Judicial Review,* 68 Harv. L. Rev. 1122–1153, 1326–1373. In short, while this Court's decisions are in general agreement as regards the principles, it is in some instances hard to reconcile their application.

In the instant case, the customary difficulties are intensified and further complicated by the unusually large number of broad constitutional issues raised, and by the wide variations in their

relative degree of ripeness for judicial review. Some of the issues arise solely from alleged fears of possible future interference with appellants' constitutional rights; such matters are so speculative and remote as certainly to fall outside the constitutional concept of "case or controversy" which limits the federal judicial power (see *infra,* pp. 27–29). Many of the issues relate to matters as to which appellants have neither sought nor exhausted readily available administrative remedies, and hence which are not justiciable as a matter of universally accepted judicial policy (see *infra,* pp. 29–32). No serious question can be raised that in so far as this litigation involves issues of these two types, the holding of the court below that there is no justiciable controversy is correct.

However, appellants' pleadings raise at least one issue as to which the problem of justiciability is both difficult and close. This is the question whether appellants can be subjected to any supervision at all, pending their ultimate deportation, wholly irrespective of any particular terms which may be administratively imposed, and assuming that full allowance will be made administratively for individual problems involving personal hardship. This one issue seems to meet the minimum constitutional requirements of a "case" or "controversy". Nevertheless, it does not here appear to arise in a sufficiently concrete and definite factual setting to meet those additional requirements of justiciability which this Court has de-

veloped, in the light of experience and as a matter of sound and wise judicial administration, in such cases as *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222 (see *infra,* pp. 32–39).

A. HYPOTHETICAL ISSUES, BASED ON SPECULATION AND FEAR THAT APPELLEE IN THE FUTURE MAY POSSIBLY INTERFERE WITH APPELLANTS' RIGHTS, ARE NOT JUSTICIABLE UNDER THE CONSTITUTION

The basic constitutional requisite for an exercise of the federal judicial power, under Article III, Section 2 (App. A, *infra,* p. 70), is the existence of a "case" or "controversy". Although this term is, of course, undefined by the Constitution, its general meaning has been authoritatively developed by the past decisions of this Court. Among the universally accepted constitutional requisites for justiciability is that substantial legal rights must have been subjected to imminent invasion rather than to speculative or remote or contingent impairment. See *e. g., Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162; *Stearns* v. *Wood,* 236 U. S. 75, 78; and cases collected in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461.

Some of the issues here raised by appellants unquestionably fail to meet this constitutional limitation. For example, each appellant challenges the constitutionality of the requirement contained in Section 242 (d), *supra,* pp. 4–5,

and in the orders of supervision that they "submit, if necessary, to medical and psychiatric examination".[11] Yet their pleadings contain not a single allegation that even one of them has ever been requested, following their subjection to supervision, to report for or to submit to any such examination.[12] Similarly, appellants' wholly conjectural fears as to the type of questioning to which they might be subjected (quoted *supra*, p. 13) are equally remote and hypothetical and unsupported by the elements of any present controversy. Determination of theoretical issues of this type which might possibly arise in the future falls squarely beyond the scope of the constitutionally delegated judicial power.

As for the remaining issues, the solution does not appear to rest solely on constitutional grounds. No precise test as to the exact constitutional limits of the federal judicial power has or can be formulated. Necessarily the matter is one of degree. Cf. *Maryland Casualty Co.* v.

[11] In the orders of supervision, the wording "said alien shall *upon request* * * * submit * * * to medical and psychiatric examination" (R. 13) is used. (Emphasis supplied.)

[12] The record affirmatively shows the circumstances under which medical and psychiatric examinations may be occasionally necessary and properly required (R. 129–131). Appellants' suggestion that they may be compelled to report for such examinations two or three times a day (Br. 47) are of course utterly ridiculous. Such extreme speculation involves no possible present interference with appellants, and presents no matter within the constitutional power of the courts.

Pacific Coal & Oil Co., 312 U. S. 270, 273. However, in determining whether any particular claim is properly justiciable, there is generally no occasion to adjudicate these constitutional limits with exactness. This is because the courts have developed various self-imposed limitations in the field of justiciability. These limitations are particularly applicable where, as here, a decision is sought on complex and ill-defined constitutional questions. Thus as a matter of wise judicial discretion, developed in the light of experience and on the basis of powerful considerations of policy, the courts will not decide issues—especially constitutional issues—which do not appear to be sufficiently ripe for proper adjudication, even though minimum constitutional requisites for justiciability are present. Such ripeness does not exist here, owing, *inter alia*, (a) to appellants' obvious failure to exhaust their administrative remedies (see *infra*, pp. 29–32) and (b) to their seeking what is essentially an advisory determination of the legal consequences of desired future conduct, rather than a vindication of rights already subjected to immediate interference (see *infra*, pp. 32–39).

B. APPELLANTS HAVE FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES

Appellants have, of course, been notified through the orders of supervision that they have become subject to the requirements of Section

242 (d). They have also been notified as to the specific terms which have initially been deemed appropriate in their particular case. However, these orders are not fixed once and for all, and are subject to substantial modification, either on *ex parte* action by the administrator or on application of the alien (see App. B, *infra,* pp. 74, 75).

Appellants are here asking this Court to declare invalid the orders of supervision and the statute pursuant to which the orders were issued, without having exhausted available administrative relief. In their anxiety to get an immediate judicial decision on the complex constitutional issues which they raise, they have totally disregarded the ready availability of administrative relief to provide appropriate adjustment of their orders of supervision in the event of any genuine hardship.[18] The Court cannot be asked to speculate

[18] Appellants' quotation from the opinion below (Br. 14), to the effect that the District Director "has no power to take any further action beyond what he has already done", misconceives the import of the observation. The language appears, not in any context indicating that the Director could not adjust the supervisory requirements, but only in connection with the court's observation that the Director would not be the one to take the further steps in prosecution; the court said, "it is the Attorney General or the United States Attorney * * * who will determine whether or not [appellants] or any of them should be prosecuted" (R. 163–164). See also the earlier portion of the opinion which states (R. 162): "[N]o action of any kind * * * has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action."

that, if any appellant had presented or should in the future present to the administrative authorities such facts as, for example, the conflict of a required reporting date with an important working date, the authorities would arbitrarily refuse to make any reasonable change of the date, or would deny him any right truly his.

Indeed, as the record shows, in at least one instance where actual facts of hardship were called to the attention of the administrative officials, the requirement of reporting in person was wholly eliminated and permission to remain outside the 50-mile travel radius was granted (R. 131). Additional modifications, alleviating in substantial part specific hardships complained of by appellants, have since been administratively made and called to the attention of the court below (see fn. 7, *supra,* p. 12; and App. B, *infra,* pp. 73–74). Until such administrative relief is fully availed of, no properly justiciable issues are raised as to all matters involving a possibility of revisory administrative action, and this involves almost every one of appellants' contentions challenging the validity of the statute "as applied" (Br. 4–5).

The case, therefore, in substance, poses a question similar to that involved in any case of failure to exhaust administrative remedies. See ***Myers*** v. ***Bethlehem Shipbuilding Corp.,*** 303 U. S. 41, 50–52; ***Macauley*** v. ***Waterman Steamship Corp.,***

327 U. S. 540, 544. The application of this doctrine to immigration cases is described in *United States* v. *Sing Tuck,* 194 U. S. 161. If appellants hereafter avail themselves fully of their administrative remedies they may, in the first place, be afforded such rulings as will make unnecessary any recourse to the courts. If, on the other hand, the result of the administrative proceeding is adverse to the individual involved, the case will then reach the courts in a definite form with findings of fact and expert interpretations, made in the light of a specific factual background, which will narrow and eliminate extraneous and unessential issues. The effect, of course, of permitting a suit to be tried in court before it has followed its natural course through administrative proceedings, is to shift burdens to the courts which Congress intended to be resolved in the first instance by the special procedures it has provided.

C. UNDER CONTROLLING PRIOR DECISIONS, BROAD AND ILL-DEFINED CONSTITUTIONAL ISSUES ARE NOT APPROPRIATE FOR JUDICIAL DETERMINATION, WHERE THE OCCASION FOR THE IMPOSITION OF ENFORCEMENT SANCTIONS HAS NOT YET ARISEN AND MAY NEVER ARISE

1. After eliminating from this case all issues of the two types discussed above (pp. 27–32), there still remains one contention as to which the matter of justiciability is relatively close and difficult, and which appears to meet the minimum constitutional requirements of an actual "case" or

"controversy". This contention is that it is *per se* unlawful and injurious for appellants to be subjected to any supervision whatsoever, irrespective of what its terms may be. However, even though a present controversy on this issue may exist in the constitutional sense, it does not necessarily follow, as a matter of proper judicial administration, that the controversy is necessarily sufficiently developed to be ripe for adjudication. Thus the courts have wisely refused to exercise their discretionary authority to determine broad constitutional issues presented in cases having some of the elements of a present controversy, but where the indispensable concrete factual background is largely, though not wholly, *in futuro*. *E. g., United Public Workers* v. *Mitchell,* 330 U. S. 75; and *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222. This is particularly true where, as here, ill-defined constitutional issues are raised, and the litigants seek what is essentially an advance advisory ruling to determine the legal consequences of future conduct in which they desire to engage (*ibid.*).

Under this Court's recent decisions in the two above cited cases, when a statute imposes restrictions or consequences upon specified conduct, no justiciable controversy can be built upon a mere allegation of a desire to act in the future in a manner contrary to the statutory restrictions. Instead, there must be the actual posing of a controversy in factual detail, with no remaining

area for further revisory administrative action, which by amelioration or definition of the restrictions, might render judicial intervention unnecessary or lead to a different ultimate judicial decision. In the *International Longshoremen's* case, the law as well as its basis in reason is concisely summarized as follows (347 U. S. at 224):

> Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

In the instant case, it is highly significant, in determining the matter of justiciability, that appellants have not in any way violated the orders of supervision, so that no occasion for the imposition of enforcement sanctions has yet arisen. Furthermore, such an occasion may never arise.

However, appellants have in fact been notified that they are subject to supervision, as required by Section 242 (d), and have been directed either to take or to refrain from taking certain specified action. Thus this Court would appear to have constitutional power to adjudicate appellants' general contention that, although they are aliens against whom a final order of deportation has been made on the ground of membership in a subversive organization, they have a constitutional right to be free from all supervision pend-

ing eventual deportation. As to this one issue, the matter of justiciability is close. The decision calls for a delicate adjustment between powerful and closely competing policy considerations. On balance, the court below appears to have solved this matter correctly, in holding that no justiciable controversy had been alleged, as more fully appears from the further analysis which is set forth in Appendix C, *infra,* at pp. 78–83.

However, this Court may conclude that the balance inclines very slightly in favor of holding that appellants' attack on the statutory power of supervision is sufficiently ripe for determination, even though (a) there has been no exhaustion of administrative remedies, (b) a complete concrete factual setting is lacking, and (c) *United Public Workers* v. *Mitchell,* 330 U. S. 75 (discussed in Appendix C, *infra,* pp. 78–80), on which the three-judge court placed principal reliance (R. 164) in dismissing appellants' complaints, appears to hold otherwise.

If this Court should so hold, this is the only point which would be ripe for decision.[14] Such a contention cannot serve as a device for opening the door of the courts to the main thrust of the complaints, which seek adjudication as to a miscellany of alleged inconveniences and hardships that have not yet crystallized into an actual case

[14] The lack of merit in such attack is discussed, *infra,* pp. 39–69.

within the constitutional limits on justiciability. If a broad, untenable contention carries with it the right to obtain an adjudication of many details which have not developed into a real controversy, the constitutional limitation on the jurisdiction of courts is circumvented by the simple expedient of broad pleading. As to all problems beyond the general one of the right to exercise any supervision at all, the decisions of this Court above cited are clearly controlling (*supra,* pp. 27, 31–32).

2. Appellants cite Section 10 of the Administrative Procedure Act (App. A, *infra,* pp. 70–72) as an express authorization of their proceeding (Br. 11–12, 17). However, this Act is manifestly inapplicable to the major portion of the complaints, which presents objections to various details and provisions of the supervisory requirements which necessarily are committed to the discretion of the administrative agency, and as to which administrative remedies have not been exhausted. The Act did not change the rule requiring exhaustion of administrative remedies before judicial relief becomes available. Nor does it alter the accepted concepts, discussed *supra,* pp. 32–35, relating to ripeness for adjudication and the requirement of a factual background sufficiently concrete to permit a proper exercise of the judicial functions. Furthermore, the mere invoking of the Act does not conclude the basic question of justiciability here discussed, since no statute is to be read as con-

ferring jurisdiction for judicial review in contravention of the constitutional limitation of jurisdiction to actual cases and controversies (see, *supra,* pp. 27–29).

Appellants attempt to shore up their claim of justiciability by putting emphasis upon their request for a declaratory judgment (Br. 17–19). The declaratory judgment process is not only governed by the same basic constitutional requirement as other litigation in the federal courts, but is specifically restricted by its own statutory authorization to "a case of actual controversy." 28 U. S. C. 2201, App. A, *infra,* p. 70. Moreover, invoking this remedy does not in any way obviate the need to exhaust administrative remedies; and, in any event, the award of such relief is a matter of sound judicial discretion. Particularly pertinent is the language of *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (cited with approval in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 90):

> The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision, * * * or to formulate a rule of constitutional law

> broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied, * * *. [Asterisks indicate citations of authorities.]

The numerous decisions cited by appellants (Br. 11–19), far from sustaining appellants' position, are so substantially different in factual posture that they do not support the claim of justiciability. In comparison with the holdings and quotations upon which appellants rely, it is evident that the bulk of appellants' complaint is directed, not against a final order inflicting substantial irremediable damage but rather against a continuing group of discretionary supervisory requirements, which can and would be modified upon application in any required reasonable degree.

In sum, the Court is thus confronted with little more than an effort to induce it to give an advance advisory opinion as to what the administrative authorities could or should rule, without opportunity on the part of the administrative authorities first to complete the administrative process so that a concrete factual issue would be presented. Accordingly, no properly justiciable case or controversy has been reached. Such a premature, generalized attack upon an enactment clearly falls within the condemnation of *Electric Bond Co.* v. *Securities and Exchange Comm'n.*,

303 U. S. 419, 443, concerning "a variety of hypothetical controversies which may never become real" and concerning an attack on "statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived."

II

THE PROVISION FOR GENERAL SUPERVISION OF ALIENS ORDERED DEPORTED WHOSE DEPORTABILITY HAS NOT BEEN EFFECTED IS CONSTITUTIONAL ON ITS FACE

As discussed, above, at pp. 35–36, even if a justiciable controversy should be deemed to exist in the instant case, the only question which could be open at this time would be the general right of supervision. Since appellants are presently subject to supervision, this Court may decide that they have sufficient standing to test that general right in this litigation, even though the District Director of Immigration, under whose supervision appellants are, has no authority himself to institute a prosecution of appellants for failure to obey the orders of supervision and no prosecution has been started or threatened. Assuming that this one issue is open, the judgment of the court below should be affirmed on the merits, since there can be no serious question of the power of Congress to require some supervision of the aliens here involved.

Preliminary to a more detailed analysis of appellants' contentions, it is necessary to note

certain basic aspects of the problem which appellants ignore throughout their brief, but which are of the greatest importance in every phase of the analysis.

First, it must be kept in mind that appellants at no point contend that they are not rightfully being deported, nor do they claim that the administrative proceedings in which they were ordered deported were procedurally defective or unlawful in any manner. The status of appellants as undesirable aliens is accordingly clear and uncontroverted. Secondly, this status of appellants as deportable aliens sets them apart from citizens and other resident aliens. Persons in appellants' status have an unusually strong motivation to disappear into the general population of the country in order to avoid deportation. In addition, appellants have in the past supported the Communist Party as members. Now, with deportation only a matter of time, they are relieved of one of the few deterrents—and perhaps the only potent deterrent—of such support, *i. e.*, the fear of deportation.

The legislative and executive branches of the government are thus confronted with concrete, actual problems. They should not be lightly relegated, in discharging the responsibility resting upon them, to mere acceptance of the assurances of persons having such a record, that they will appear when deportation is arranged, and

that they will not participate in subversive activities if allowed unlimited associations with or employment by members of the Communist Party.

These aliens have been found, pursuant to law, to have no legal right to be in this country. They are here only because it has not proved possible to deport them. If Congress has the power to expel them from the country entirely, *Galvan* v. *Press,* 347 U. S. 522, it must clearly have the power to deal with the situation here presented. Although theoretically appellants should not be here, they may in fact be here for considerable periods of time. Congress has developed a reasonable and practical solution for this practical problem. It has decreed that the aliens shall not be kept in detention indefinitely, but shall be subject to such supervision as will tend to insure their deportability when that can be effected and also to prevent the freedom thus granted from being used to the detriment of the internal security of the United States. At a time when it remains necessary to call citizens into the armed forces of the nation, involving for such citizens grave impact upon their customary liberty, it is clearly not unreasonable to direct proper supervision of aliens whose past record discloses a contribution to the source of the current, all-pervading danger.

A. NO UNCONSTITUTIONAL DEPRIVATION OF LIBERTY AND NO PUNISHMENT IS IMPOSED BY THE STATUTE

The basic considerations just discussed are in themselves an answer to appellants' contention (Br. 24–30) that supervision deprives them of their liberty "without judicial trial." The special status of appellants as deportable aliens who have not yet been deported manifestly justifies some form of special treatment. The treatment specified by Congress, which is not detention, but is not yet full and absolute freedom, is clearly reasonable. Supervision which is substantially less burdensome than that normally imposed on members of the armed forces cannot be equated to a real administrative deprivation of liberty such as the imprisonment and hard labor provision of *Wong Wing* v. *United States,* 163 U. S. 228. In many of its aspects it is no more burdensome than the requirements imposed by many civilized countries on all aliens in their midst. It does not become "deprivation of liberty without judicial trial" and "punishment" merely because appellants choose to call it such. It remains a mild form of supervision.

This Court, in *Carlson* v. *Landon,* 342 U. S. 524, in upholding the statute authorizing the Attorney General, in his discretion, to hold an alien in custody pending determination of deportability, stated (pp. 534, 537–538):

> The basis for the deportation of presently undesirable aliens resident in the

United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.

* * * * *

Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution. Since deportation is a particularly drastic remedy where aliens have become absorbed into our community life, Congress has been careful to provide for full hearing by the Immigration and Naturalization Service before deportation. Such legislative provision requires that those charged with that responsibility exercise it in a manner consistent with due process. Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings. * * *

The final sentence of the foregoing quotation is, *a fortiori,* applicable in full justification of the power to prescribe reasonable regulations for the supervision of aliens, especially when such aliens are not merely awaiting a finding that they are deportable but actually and finally have been found deportable. Such regulations are clearly needed in order to insure the aliens' presence for deportation when that can be effected and in order to prevent the intervening period, a period of relatively general freedom, from being used to the detriment of the United States, particularly in the deleterious manner which was the reason for the deportation in the first place. An alien does not become less likely to disappear and less likely to be dangerous to the United States when he has finally been ordered deported and thus is no longer deterred in any degree by the desire and prospect of continued residence in the United States.

What has been pointed out, *supra,* pp. 39–44, concerning the clear needs and purposes of the precautions with respect to aliens in the status of appellants, likewise disposes of their contention that they are being "punished" (Br. 31–34). It is a common fact of present-day life and law that public needs impinge, in an unending array of instances, upon the liberties and property of various classes of individuals, *e. g.,* the induction requirements of the selective service system. Appellants concede that the impact on the indi-

vidual becomes a "punishment" only in the absence of a reasonable relation of that impact to the public need which is sought to be met (Br. 31). Appellants make no showing of any aim on the part of either Congress or the executive branch to employ the supervisory program for any punitive purpose or, indeed, any purposes other than the obvious purposes incidental to the conceded right to deport and the right and duty to safeguard the nation as to this particular type of alien.[15]

In this connection, appellants contend that *Wong Wing* v. *United States*, 163 U. S. 228, forbids the government not only to hold in custody but "otherwise to restrict the liberty of deportable aliens" (Br. 25, 27). The decision supports no such contention. In *Wong Wing* there was not, as here, a regulatory program having as one of its direct and obvious objectives the assurance of the alien's presence when deportation can be effected, and the safeguarding against the lessened sense of responsibility of an alien who has lost all

[15] To the extent that details of supervision are required by the statute itself, issues as to the reasonableness of such requirements on their face may be said to be involved in the more general issue of the right to supervise. The general requirements are, however, so clearly a concomitant of any power to supervise at all, and appellants' objections thereto are so intertwined with their speculations as to what may occur in the future under the orders of supervision that we discuss these matters in Point III, *infra*, pp. 60–69, dealing with the orders of supervision.

362802—55——4

stake in the country. In *Wong Wing* there was, instead, complete custody for a fixed period unrelated to any time in which deportation would become available. As distinguished by the Court itself (163 U. S. at 236):

> There is an evident implication, in this language, of a distinction between those provisions of the statute which contemplate only the exclusion or expulsion of Chinese persons and those which provide for their imprisonment at hard labor, *pending which their deportation is suspended.* [Emphasis supplied.]

The imposition on Wong Wing of "infamous punishment at hard labor" (163 U. S. at 237)) could not be related to his expulsion in any respect, except as punishment. As pointed out by the Court, the term of imprisonment delayed the expulsion, whereas in the instant case, the modest supervision is in large part directed toward assuring the expulsion at the earliest possible time.[16]

This reasonable supervision, which is directly related to the particular status of appellants as

---

[16] Clearly inapposite are a group of appellants' citations dealing with instances of actual custody, rather than the limited supervisory restrictions of the instant case, *i. e.*, *Ross* v. *Wallis*, 279 Fed. 401 (C. A. 2); *Sakzagansky* v. *Weedin*, 53 F. 2d 13 (C. A. 9); *Mezei* v. *Shaughnessy*, 195 F. 2d 964 (C. A. 2), reversed as inapplicable to an excludable alien, 345 U. S. 206; *Dzuro* v. *District Director*, 102 F. Supp. 704 (S. D. N. Y.); *Kusman* v. *District Director*, 117 F. Supp. 541 (S. D. N. Y.); *Blankenstein* v. *Shaughnessy*, 117 F. Supp. 699 (S. D. N. Y.). *Petition of Brooks*, 5 F. 2d 238

aliens who have been ordered deported, is not transformed into "punishment" on the basis of appellants' dubious assertions that no country will ever accept them and that they may thus be subject to supervision indefinitely. One cannot undertake here to assess the international situation for the balance of each appellant's life. Moreover so long as the current dangers exist, safeguards against the dangers will remain safeguards, and are not to be confused with punishment merely because of their duration. There must continue, as an incident to deportation, a means of protecting the nation against a clear consequence of every order of deportation, *i. e.*, the lessened control over the alien in removing the influence of the former prospect of being able to remain resident in the United States. Cf. *Shaughnessy* v. *Mezei*, 345 U. S. 206, holding that there was no limitation on the time an excluded alien, whom no other country would receive, could be held in custody.

Appellants, after full and fair hearings resulting in findings that they are undesirable as per-

---

(D. Mass.) included broad language to the effect that any control of freedom was illegal but the actual decision was directed to the lack of jurisdiction of *a court* in the absence of statutory authority to direct periodical reports and bond by a deportable alien. Even with respect to this limited aspect of the *Brooks* holding, it was pointed out in *Dzuro*, 102 F. Supp. at 706, that "Congress was careful to abolish the rule of Petition of Brooks that enlargement after entry of order must be unconditional".

manent residents of the United States, and after orders for their deportation which have been presently frustrated but neither abrogated nor determined to be permanently unenforceable, constitute a group more properly comparable to excludable aliens than to the ordinary resident alien. As such, they might perhaps be subject to actual custody, but nothing remotely approaching custody is involved in the limited supervisory precautions taken with respect to them. To the narrow extent that the precautions may affect appellants' liberty, there is overwhelming counterbalancing necessity in the need to assure enforcement of the deportation orders and to prevent further conduct harmful to the United States.

B. THERE IS NO DENIAL OF EQUAL PROTECTION

With respect to the complaint that a denial of equal protection of the laws is involved in the instant case (Br. 34–37), it is necessary only to turn to appellants' own recognition that what is constitutionally objectionable is an arbitrary or unreasonable classification of persons upon whom duties and limitations are imposed (Br. 35). What we have reviewed above (pp. 39–48) emphasizes the exceptional nature of appellants as aliens who have been ordered to be expelled as soon as possible because of their past contribution to a subversive influence within the country. The need of assuring the expulsion, and of safeguarding against further deleterious conduct

meanwhile, is not equalled (even approximately) by any factual situation in the cases cited by appellants, and that need serves fully and adequately to warrant the special provisions made with respect to aliens of appellants' class.

C. THE FACT THAT ORDERS OF DEPORTATION ARE ISSUED PURSUANT TO ADMINISTRATIVE PROCEEDINGS DOES NOT MAKE UNCONSTITUTIONAL THE IMPOSITION OF CRIMINAL PENALTIES, SUBJECT TO TRIAL BY JURY, UPON PERSONS UNDER SUCH ORDERS WHO THEREAFTER WILLFULLY AND KNOWINGLY VIOLATE THE SUPERVISORY PROVISIONS

Appellants argue that the instant statute is unconstitutional because it imposes criminal penalties for certain conduct by persons who are subject to deportation orders which are, in turn, issued pursuant only to administrative proceedings (Br. 20–22). Appellants contend that there are thus two elements in the crime, of which one element—issuance of the deportation order—is not reserved for trial in a court.

This contention ignores the fact that the merits of whether the offender should or should not have been ordered deported are not made a part of the crime. The essence of the offense is willful conduct which takes place *after* the issuance of the administrative order.

The law is replete with instances in which a status or duty is established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Such legislation is not invalid because the crimes peculiarly associated with the specific status or duties may later indirectly rest upon

the administrative determination. Thus a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body.

Perhaps the most significant analogy is the long-standing selective service legislation. The hundreds of thousands of draft classifications have not been established by jury trials, yet refusals to comply with requirements of the classifications have been made crimes by statute, and the validity of the legislation has been upheld. As observed by this Court in *Cox* v. *United States,* 332 U. S. 442, 453:

> The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order.

Similarly, price controls established by administrative proceedings were upheld in *Yakus* v. *United States,* 321 U. S. 414, this Court stating (pp. 444–445):

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of

> the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.
>
> * * * * *
>
> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States,* 209 U. S. 56, 81; *United States* v. *Adams Express Co.,* 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. [citing decisions] * * *

In short, there is no constitutional objection to the imposition of duties or consequences in connection with administrative findings.

Here again, appellants' argument rests on a misinterpretation of the decision in *Wong Wing* v. *United States,* 163 U. S. 228. The *Wong Wing* case involved an entirely different type of statute,

under which the question of whether an alien willfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an order of unlawful residence was to result, under the statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U. S. at 237). There is a clear and fundamental difference between an administrative finding automatically imposing punishment, and a group of provisions, as in the instant statute, imposing supervisory requirements, pertinent to an administratively-determined status, and providing for criminal punishment only upon judgment *in a criminal trial* that the requirements have been *willfully* violated.

There is not even involved here the problem, which is raised in the dissenting opinion in *United States* v. *Spector,* 343 U. S. 169, 174–180, of whether, in a criminal prosecution for violation of the conditions of supervision, appellants would have the right to contest the validity of the deportation orders. Appellants are not being and have not been threatened with any criminal prosecution. They are not attacking the validity of the deportation orders. They are seeking to have invalidated the provisions of supervision, regardless of the validity of the deportation orders. The statute as such is not to be invalidated upon the two-fold assumption, which is not presented by the facts of this case, (1) that the order of deportation may possibly be found to

have been entered without jurisdiction and (2) that, in a criminal prosecution, no challenge to the validity of such order will be permitted. That problem can be met when it arises. The only issue here is whether, on the basis of a finding of deportability, appellants can be subject to reasonable regulation based on the status of deportability. Under the decisions cited above, they can be so regulated, even though the status of deportability was administratively determined.

D. NO BILL OF ATTAINDER OR EX POST FACTO LAW IS HERE INVOLVED

Appellants, in contending that the statute constitutes a bill of attainder and *ex post facto* law, relate the criminal penalties imposed upon conduct of deportable aliens back to the deportation order and, without explaining the failure to challenge the order directly and in an appropriate forum, now attack the provisions of Section 241 of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. 1251, which designate membership in the Communist Party as a basis of deportation (Br. 23).

To the extent that the contention can be said to be directed at the supervision provision of the statute, the argument exhibits the pervading error of treating the criminal penalties as imposed in punishment of the acts leading to deportation rather than for acts done in violation of the supervisory restrictions, long after the order of deportation.

To the extent that appellants here seek to present the challenge which they failed reasonably and properly to present against the deportation order itself—that deportability has been found against them because of membership in the Communist Party—they are merely attempting to reargue issues determined against them in *Galvan* v. *Press,* 347 U. S. 522, and *Harisiades* v. *Shaughnessy,* 342 U. S. 580.

E. NO UNCONSTITUTIONAL DELEGATION OR USURPATION OF LEGISLATIVE POWER, OR UNCONSTITUTIONAL VAGUENESS IS INVOLVED

Appellants, in attempted reargument of the adjudicated law set forth in *Carlson* v. *Landon,* 342 U. S. 524, 542–544, contend that there is here involved an unconstitutional delegation, redelegation, or usurpation of legislative power (Br. 37–42). This Court, in *Carlson,* stated with respect to the much greater discretion as to enlargement on bail or total custody pending the mere determination of deportability (342 U. S. at 542–544):

> * * * We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. * * *
>
> * * * The legislative judgment of evils calling for the 1950 amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act. So far as pertinent to these

> proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain noncitizens, including members of the Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. Compare *Yakus* v. *United States,* 321 U. S. 414, and *Bowles* v. *Willingham,* 321 U. S. 503, 515. This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards. The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending deportation hearings. * * *

As in the case of outright detention, the authority to supervise aliens such as appellants, under orders of deportation, is to be exercised within the framework of the legislation designed to assure appellants' availability for deportation and "to guard against Communist activities" pending deportation.

Many of the specific provisions of the order of supervision do not pose any question of delega-

tion. It is the statute itself which requires the appearance from time to time before an immigration officer for identification; the medical and psychiatric examination, if necessary; and the giving of information as to nationality, circumstances, habits, associations, and activities.[17] It is only the remaining area of discretion, as to the time and extent of application of these requirements and of further reasonable restrictions on conduct to be prescribed, that can be challenged as delegated, and it is precisely in this area that a statutory provision for each detail in the case of each group of aliens would be an impossibility. Moreover, it is precisely in this area that the supervisory requirements, as presently ordered, most clearly are in accord with the policy of the legislation, albeit that policy is not, and cannot be, reduced to specific detail. To repeat the language of *Carlson* v. *Landon,* 342 U. S. at 542, "Congress need not make specific standards for each subsidiary executive action in carrying out a policy."

For instance, Congress has written into law a clear policy that aliens may not be members of

[17] As noted in footnote 15 *supra*, p. 45, while these general statutory requirements may be said to be involved in the right to supervise at all, the particular issues raised by appellants are discussed in relation to the orders of supervision, in Point III, *infra*, pp. 60–69.

the Communist Party.[18] This is a firm standard, set forth by provisions for deportation, for actual detention of six months if necessary, and supervision thereafter—the enlargement under supervision obviously reflecting the balancing of humanitarian considerations against the risks of further deleterious conduct by the aliens. Any greater detail in the setting forth of the standard in the statute would present an insurmountable task of draftsmanship and would serve only to decrease the flexibility now permitted in deference to the various needs and conditions of these aliens.

In their argument (Br. 40–41) that the instant orders usurp legislative power in disregarding other legislation (which provides that membership in the Communist Party is not to constitute a crime in itself) appellants again totally disregard the fact that any criminal consequences emanate from violation of the special provisions relating to the conduct of aliens ordered deported. Such aliens' past membership entails no criminal

[18] While the provision that the alien refrain from membership in the Communist Party is not explicitly set forth in the statute here involved, it is so clearly required by the legislative policy and it so clearly will not, in its broad aspects, be withdrawn, that this provision too can be said to be involved in the issue of the right to supervise. We discuss this point further in Point III, *infra*, pp. 64–67, and point out there that appellants' attacks on the specific language of the order do not present an issue ripe for adjudication.

consequence, but it also affords them no complete immunity as to any and all further conduct. The same error vitiates appellants' argument (Br. 41–42) that the orders of supervision increase penalties prescribed in other legislation. The penalties, obviously, are for a new and different offense. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, cited by appellants as denouncing administrative additions of penalties (Br. 42), in its actual holding found—as it must be found here—that no increase of penalties was involved (pp. 406–407).

Needless to say, the breadth of the delegated discretion is not to be tested by appellants' own extensive conjectures as to what an administrative official might suppose himself delegated to do. If, as insisted by appellants, the Attorney General should employ the right to require a medical examination, not for the obvious proper purpose of meeting the requirements of a country accepting deportees, but for "converting this subsection into an instrument of harrassment or oppression" (Br. 39), that would be no demonstration of any deficiency in the standard of delegation but rather a clear violation of it.

A variant of the same argument is the contention that the statute is subject to possible administrative abuse. Appellants cite as abuses the restrictions on area of travel and changes of residence from one immigration district to an-

other without permission (Br. 40–41), the requirement that information be given (Br. 46), and the question of the meaning of "from time to time" in connection with reporting, and "when necessary" in connection with physical examination (Br. 47). As pointed out *supra*, pp. 54–56, these are actually more specific as standards for administrative action than the statute involved in the *Carlson* case. The orders issued thereunder are even more specific. The reporting requirements have specified time and place and the restrictions on travel have specified definite mileage. When further information or physical examinations are required, the time, place, and nature of the requirements will be equally specific. Appellants' real challenge is thus not to the statute but to some terms of the orders, a matter we discuss *infra*, pp. 60–69. The statute, on its face, manifestly supplies sufficient guidance for the administrative action which must be taken before petitioners are ordered to do anything.

If the issue of the validity of the statute on its face is open for decision, that validity is so clear that there is no need to remand the cause to the District Court for adjudication. The statute is clearly a reasonable and proper method of keeping some mild control over a group of aliens who, although found to be deportable, have not as yet been deported. The treatment of such aliens as a special class is justified by their special status. The statute sets forth definite stand-

ards for administrative action in defining the terms of the supervision. It does not, however, punish on the basis of an administrative finding as such. Punishment will occur only if there is a finding by a court of a *willful* violation of the regulations pertaining to the special class. The fact that it is administratively determined that appellants are in that special class does not result in punishment without judicial trial. Appellants are thus not denied any constitutional rights by the supervision required by the statute.

III

THE ORDERS OF SUPERVISION ARE PROPER UNDER THE STATUTE

For the reasons set forth in Subpoint B of Point I, *supra*, pp. 29–32, the specific details of the orders of supervision are not now properly open for determination. Some of appellants' attacks on the orders are merely reiteration of their general contention that they should not be subject to any supervision whatsoever. Beyond that, their attacks are highly speculative and lack the concreteness which would bring them within the concept of a case or controversy. Furthermore, as discussed in Point I, appellants do not show that they have sought and been denied administrative clarification or amelioration of the details of such orders. This becomes up

parent when appellants' contentions are examined in detail.

1. If there is to be any supervision at all, it is manifestly reasonable to require some reporting by the aliens. Particularly is this so where one of the purposes of supervision is to prevent the aliens from concealing their identity and fading into the general population. The requirement for reporting once each week has been administratively changed to once each month at the central location of the District Headquarters of the Immigration and Naturalization Service at 70 Columbus Avenue in the heart of New York City (App. B, *infra*, p. 74), rather than weekly at Ellis Island as originally provided. Reporting is, of course, a normal condition of all forms of supervision.

2. As to the requirements that the alien notify of his change of residence and that he obtain permission before changing to another district, the justification for such requirements as a method of keeping informed is self evident. Comparable provisions are those requiring registration of aliens in the Immigration and Nationality Act of 1952, Sections 262-266, 66 Stat. 224-225, 8 U. S. C. A. 1302-1306, and the regulations requiring that selective service registrants notify draft boards of their address, 32 C. F. R. 1641.3, and obtain permission before leaving the country, 32 C. F. R. 1621.10. The prematurity of appel-

lants' attacks is well illustrated here. There is not and there cannot be any allegation that permission to change has been or will be arbitrarily denied.

3. The requirement that permission be obtained to travel outside of a radius of fifty miles is a precaution designed to assure that the alien remain identified and subject to supervision by the district office with a duty to supervise. Again appellants do not assert that reasonable applications have been denied or will be denied in the future. In fact, as the record shows, one of the appellants was promptly granted leave to remain in a distant resort for health purposes as soon as the need for such permission was called to the attention of appellee (R. 118-119, 131).

Appellants' argument (Br. 28) that any restriction of movement from place to place is a restriction on liberty is merely a facet of their argument that they should not be subject to any supervision whatever. As discussed in Point II, *supra*, pp. 30-46, if the aliens may reasonably be treated as a special group because of their special status, their freedom of movement may be restricted in a way which is reasonably related to that special status. In *Williams v. Fears*, 179 U. S. 270, 274-275, cited by appellants, the Court employed language recognizing liberty of movement but refused to invalidate a statute having the incidental effect of limiting laborers to go out of the state, saying "it is easy to see that if that

business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected". Cases holding that a passport may not be arbitrarily revoked recognize that, even as to citizens, freedom to travel abroad is "subject to reasonable regulation and control in the interest of the public welfare". *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D. D. C.).

4. The provision for medical and psychiatric examination, attacked by appellants (Br. 30) although not yet invoked with respect to any of them (R. 132), serves the obviously necessary purpose of providing some of the facts as to health required by countries to which the United States may seek to deport aliens, and of providing facts required in some cases by the transportation agencies (R. 132).

A number of countries, like the United States itself, require assurances of the mental and physical health of persons seeking admission. Moreover, medical examination may become necessary if an alien claims illness as an excuse for failure to comply with the conditions of supervision or as a basis for modification of the reporting requirement or the restrictions on travel. This condition is plainly not imposed for punitive purposes but as a means of effectuating ultimate deportation, and, in the meantime, of protecting the security of the United States without unnecessary hardships to the alien. If the right should

ever be abused, that situation can be dealt with when it arises.

5. Since the right to supervise exists, it is reasonable to require that persons subject to supervision answer questions which will tend to show whether the various provisions are being obeyed. Moreover, it may be necessary to obtain information sought by foreign countries. The premature, speculative nature of appellants' attacks on the details of the supervision orders is nowhere better illustrated than in their speculations as to what might occur in connection with such examination. The suggestions that appellants may be required to make self-incriminating disclosures have no foundation in presently existing facts with respect to a concrete case. When a request for such information is made of appellants, there will then be an opportunity for them to raise the privilege, to obtain a ruling thereon, and if it be adverse, to have the issue tested in the courts. Similarly, if, as appellants speculate, irrelevant questions are asked of them, that issue can be determined in relation to concrete facts. The orders of supervision refer merely to the furnishing of "such information as may be deemed fit and proper" (R. 15). The suggestion that some irrelevant questions may be asked does not show that there should not be any right to ask questions at all.

6. The provisions against further support of the Communist Party and of associations that

might cloak such support (a provision specifically not to apply, however, to association with the alien's family or legal counsel) is clearly directed toward a plain and proper purpose. If an alien may be expelled for his Communist Party activities (*Galvan* v. *Press*, 347 U. S. 522), it is reasonable to provide that those whose expulsion has been delayed shall not be afforded opportunity by that circumstance to carry on the very activities which have led Congress to order their expulsion.

Appellants argue (Br. 29–30) that in some cases the supervision requirements have resulted in loss of former, more advantageous means of employment (as, in some examples, employment by the Communist Party). Of course appellants could not have continued in their positions if they had been deported at an earlier time. Congress cannot be required to assure an alien that after he has been found undesirable all is to continue on exactly the same basis as before, especially when the previous way of life involved the type of activity which was the reason for the expulsion.

Appellants particularly attack this provision as vague, professing inability to know what is required of them. We submit, however, that upon no reasonable analysis can there be confusion as to what is and what is not to be under this provision. First, there is clearly excluded from

the order any prohibition against associating with members of the family or professional legal counsel.[10] With this limitation it is ordered (R. 13–14):

> (a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary branch, affiliate, or subdivision of any such group or organization.
>
> (b) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, * * *.

Appellants in their affidavits pose in substantially identical language an array of conjectural problems as to what constitutes "support", what constitutes a "doctrine" or "policy" of the Com-

[10] (R. 14): "the term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a)."

munist Party; what constitutes an "affiliate" of the Party; and what is meant by "associating" (e. g., R. 22–23; see Br. 45). The answer to this type of argument is that, in all but the extreme borderline of areas of conduct, appellants will know very well whether they are helping the Communist Party and its policies. They will thoroughly know what they are up to in any contacts with other persons and they will know with whom they are associating. Any genuine slip-up or misunderstanding will be subject to the statutory requirement that their violation be willful or knowing. Moreover, they can place doubtful cases before the administrative authorities."

"We find no reasonable similarity in such cases as those cited by appellants in their brief at pp. 43–45. *Stromberg v. California*, 283 U. S. 359, 369, involved a prohibition against a sign "in opposition to organized government"; it was because this could include orderly opposition that the provision was held invalid. *Musser v. Utah*, 333 U. S. 95, 97, involved a statute penalizing any act "injurious to public morals", but the matter was remanded, as the state court was to be afforded opportunity to interpret the statute more precisely (as, in the instant case, the administrative authorities should first be afforded opportunity to interpret their own orders). *Lanzetta v. New Jersey*, 306 U. S. 451, involved a statute penalizing "gangsters", the definition including the phrase, a member of any "gang" consisting of two or more persons. *Connally v. General Const. Co.*, 269 U. S. 385, involved the "current rate of per diem wages in the locality where the work is performed." *United States v. Cohen Grocery Co.*, 255 U. S. 81, involved, without further standards, "unjust or unreasonable rate or charge" and "excessive prices for any necessaries." In *United States v. Cardiff*, 344

Beyond this, appellants' complaint is not one of inability to understand what is required of them but rather an obdurate insistence that they should not be required to desist from the clearly proscribed associations and to take adequate steps to avoid such associations.

Appellants are not entitled, upon complaint of vagueness, to be furnished an impossibly precise guide-line which they can press to the utmost in technical ingenuity and avoidance. The substance of what is asked of them is clear; if, instead of sincere effort at compliance, they choose to test the outermost limits of the relatively general freedom still accorded them, their possible criminal involvement will be no product of vagueness in the order but of their own recklessness. The appropriate principle was stated in *United States* v. *Wurzbach,* 280 U. S. 396, 399:

> * * * Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. * * *

U. S. 174, a statute permitted entry by government inspectors upon making request and obtaining permission. It was held that the requirement that an owner *grant* permission was not clearly enunciated in the statute, and that, accordingly, the owner could not be convicted for refusal to grant permission.

The above analysis makes clear that appellants' attacks on the orders of supervision, insofar as they involve anything more than the general contention that appellants should not be subject to supervision at all, have no foundation in existing facts. Even if there were more merit in them than has yet been shown, they are not ripe for adjudication at this time.

CONCLUSION

For the reasons stated above, we respectfully submit that the judgment below should be affirmed. If, however, this Court should be of the opinion that a justiciable case or controversy is presented and that the case, as thus far presented, does not afford an adequate basis for rejection of appellants' contentions on the merits and affirmance of the judgment below, the case should be remanded to the District Court for further appropriate proceedings.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY, III,
Assistant Attorney General.
GRAY THORON,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

L. PAUL WININGS,
General Counsel,
Immigration and Naturalization Service.

OCTOBER 1955.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO JUSTICIABILITY

Article III, Section 2, of the Constitution in pertinent part provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—* * * to Controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Federal Declaratory Judgment Act, as codified in 28 U. S. C. 2201, and as amended August 28, 1954, 68 Stat. 890, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1009, in pertinent part provides:

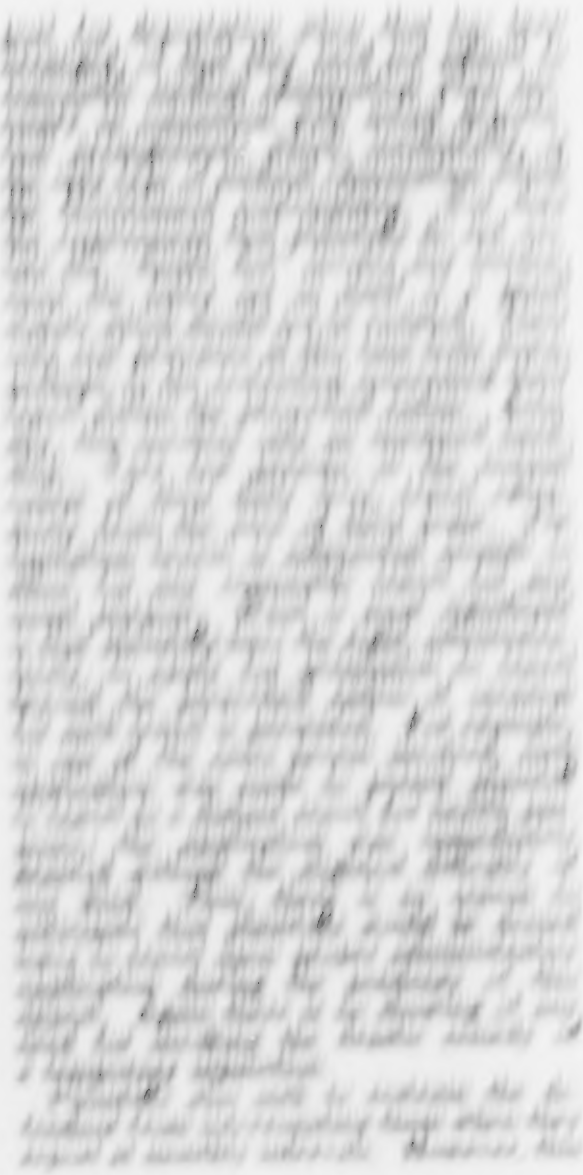
> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

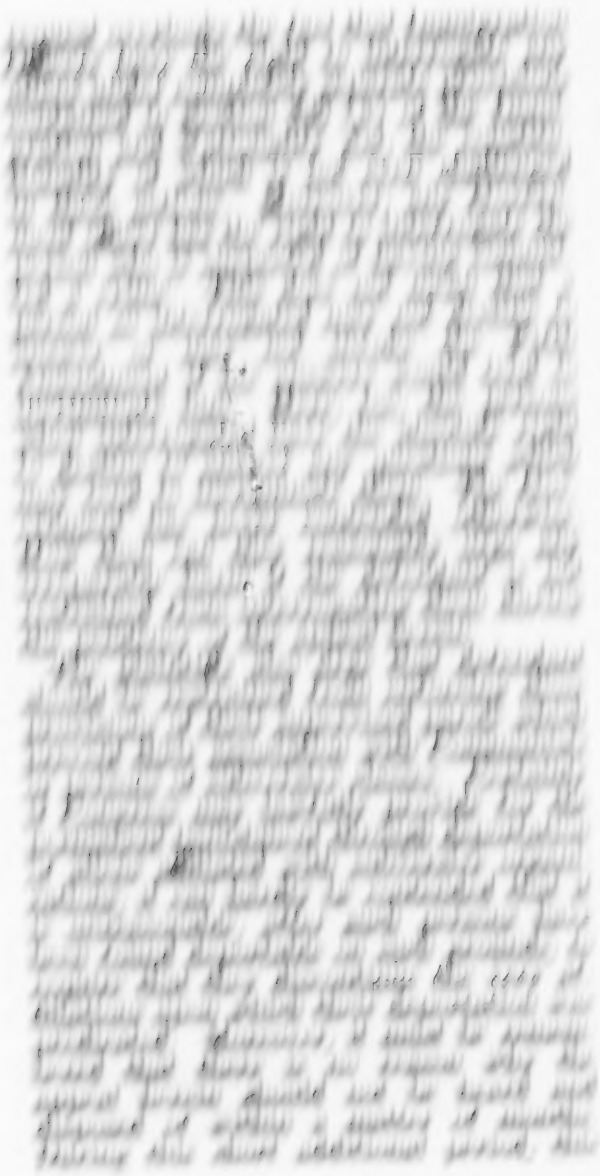
action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise





[illegible]

not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.

These basic principles have received further confirmation in both the extensive analysis appearing in the concurring opinion of Mr. Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 149–160, and in the Court's decision in International Longshoremen's Union v. Boyd, 347 U. S. 222. In Mr. Justice Frankfurter's Joint Anti-Fascist analysis, he lists numerous elements indicating lack of justiciability which appear in the instant case. Among them is the question whether the action has "come to rest" or whether the impact of the government action will at a future time "become more conclusive, definite or substantial" (341 U. S. at 154, and fn. 4). Included also is a reference to the practice of "evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief" (341 U. S. at 153).

In the instant case, controlling hardship in denial of judicial relief is not established by the fact, common to citizens and aliens alike, that violation of the law may lead to a criminal prosecution. Cf. Douglas v. Jeannette, 319 U. S. 157, 163. A case cannot virtually be assumed into existence by a preliminary assumption that a needed and reasonable modification of the suspensory arrangements would be arbitrarily denied by the administrative authorities, or that, in the event of an inadvertent violation, or of a

sincere and appropriate challenge of the requirements, a ruinous penalty would either be asked by the government or imposed by a court. Furthermore, it should be noted that the penal provision of the statute (*supra*, p. 5) requires that the offenses be "willfully" or "knowingly" committed.

In *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222, this Court dealt with the complaint of resident aliens who went to Alaska each summer to work in the canneries and who were confronted with an interpretation under the 1952 Immigration and Nationality Act whereby they would be subjected, upon return, to the grave political consequences of being considered as if they were aliens entering the United States for the first time. Their complaint was ordered dismissed by this Court as not yet being a suit to enforce a right. To establish justiciability there must be an immediate, actual adverse effect, within the context of an existing concrete case. See particularly, 347 U. S. at 224, quoted *supra*, p. 34.

Two subsequent decisions have further demonstrated the requirement that the status of an actual, rather than future, controversy be involved. In *United States* v. *Harriss*, 347 U. S. 612, this Court, while passing upon the constitutionality of the Lobbying Act with respect to certain things already done by the appellees, refused to pass upon the constitutionality of a provision imposing specific disabilities after a first conviction. There, as here, there was vigorous contention that the added penalty would have

immediate present effect, rather than merely contingent future operation (O. T. 1953, No. 32, Br. of Appellee Harriss, pp. 6–7, 19–20), but the Court rejected the contention, pointing out that if, for example, appellees were found innocent of the first offense, the further provision would not be applied against them (347 U. S. at 627).

In *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 336, this Court very recently held that a railroad was not entitled to judicial relief where it complained of a proceeding of the National Railroad Adjustment Board upon the ground that notice had not been given in the proceeding to a necessary party. The relief was sought prior to any decision on the merits by the Board, and the Court, despite the vigorous opinion of the Court of Appeals to the contrary in 212 F. 2d 22, 28–29, pointed out, *inter alia*, that the Board's award might ultimately be one which would be devoid of adverse effect on the railroad. 349 U. S. at 373.

U. S. GOVERNMENT PRINTING OFFICE: 1955